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(1)

No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

WILLIAM F. JENNINGS,

Petitioner,

v.

JOSHUA INDEPENDENT SCHOOL DISTRICT, *et al.*,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Does Rule 11 of the Federal Rules of Civil Procedure permit a court to order a civil rights plaintiff, represented by a licensed attorney, to pay the attorney's fees of the defendants because the complaint, which the plaintiff did not sign, was found to be factually correct, but without legal merit?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following additional persons were defendants-appellees in the district court and are respondents in this Court: Charles Greenawalt, Larry Lofton, Francesca Raines, Royce Ingersoll, Institute for Criminal and Civil Investigation, and Security Associates International. Don Gladden, who was the attorney for petitioner William F. Jennings, was an appellant below. Although he is filing a separate petition in this Court, he is a respondent on this petition. Petitioner Jennings' daughter, Naomi Jennings, was a plaintiff in the district court and an appellant on the first appeal, but is no longer a party to this proceeding. David Stevens and the City of Joshua, Texas, were originally defendants, but are no longer parties to this proceeding.

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Petition for a Writ of Certiorari
to the United States Court of Appeals
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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, from which review is sought, is reported at 948 F.2d 194 (1991), and is reproduced in the appendix ("Pet. App.") at 1a-9a. The memorandum opinion of the District Court for the Northern District of Texas imposing sanctions is reproduced in Pet. App. at 10a-26a, and is not reported. The first opinion of the Court of Appeals, affirming the imposition of Rule 11 sanctions, is reported at 869 F.2d 870 (5th Cir. 1989), and is reproduced in Pet. App. at 27a-42a. That Court's subsequent opinion granting the petition for rehearing in part, modifying a portion of its prior decision, and vacating and remanding that section of the district court opinion imposing sanctions for reconsideration in light of an intervening decision of the Court sitting *en banc*, is reported at 877

F.2d 313 (5th Cir. 1989), and is reproduced in Pet. App. at 43a-45a. The order of the district court awarding reduced sanctions on remand is reproduced Pet. App. at 46a-49a, and is not reported. The order of the district court denying the motion to amend or alter the judgment is reproduced in Pet. App. at 50a and is not reported. The Court of Appeals' denial of a motion to recall the mandate is reproduced in Pet. App. at 51a-53a, and is not reported. The Court of Appeals' denial of a petition for rehearing and suggestion for rehearing *en banc* is reproduced in Pet. App. at 54a-55a, and is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1991. The denial of a timely petition for rehearing was entered on January 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 11 of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. ... The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause

> unnecessary delay or needless increase in the cost of litigation. ... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This petition concerns sanctions imposed under Rule 11 of the Federal Rules of Civil Procedure, jointly against the client, petitioner William F. Jennings, and his attorney on the merits, Don Gladden, who is filing his own petition presenting a separate, but related question. This petition asks the Court to decide whether a client, who did not sign the complaint, may be sanctioned under Rule 11 when the offending conduct is that his attorney's pre-filing inquiry into the law was not adequate and hence sanctionable.

The merits of this case involved a dispute about the constitutionality of the policy instituted by the respondent Joshua Independent School District under which trained dogs were used to sniff cars in a high school parking lot. If the dog targeted a car as possibly containing contraband, the car's owners were asked to consent to a search. If consent were refused, the police were called. Petitioner believed that such searches violated the Fourth Amendment rights of the owners and drivers of the targeted cars. Accordingly, when the car that petitioner's high school daughter drove to school was targeted, he and his daughter refused to consent to what they believed was an unconstitutional search. The school then summoned the police, who decided to seek a search warrant. A warrant was obtained, but the search proved negative.

Petitioner contacted a number of lawyers, including Don Gladden, a cooperating attorney with the Greater Fort Worth Chapter of the American Civil Liberties Union. He fully dis-

closed to Mr. Gladden all of the relevant facts, most of which were never disputed. Mr. Gladden alone signed and filed the complaint on behalf of Mr. Jennings and his daughter, seeking damages from the school and its officials who participated in the events leading to the search, as well from the independent contractors who provided the dogs to the school (collectively referred to as the "school defendants"), and the police officer who conducted the search. Jurisdiction was based on 28 U.S.C. § 1343.

After the district court denied motions to dismiss or for summary judgment with only a brief explanation, the case went to trial. At the conclusion of plaintiffs' case, a directed verdict was entered in favor of all of the defendants except the police officer, who was subsequently found not liable after the jury concluded that the affidavit that he submitted to obtain the search warrant was not false and that he had no reason to believe that it was false.

The school defendants then sought sanctions under 42 U.S.C. § 1988 and Rule 11 against Mr. Jennings and his attorney for the full amount of their attorneys' fees. The thrust of their motion was that the case should never have been brought against them because they did not conduct a search and because they were not responsible, as a matter of law, for the search that the police officer ultimately did conduct. There was no claim that Mr. Jennings misrepresented the facts or insisted that his attorney press a claim that he had been told was without legal merit. Nor did anyone question Mr. Jennings' good faith belief that the search was unconstitutional. In fact, no one ever suggested any specific act attributable to Mr. Jennings that was independently sanctionable. Moreover, the motion did not allege that any paper that Mr. Jennings had signed was made without a reasonable inquiry. Indeed, the only paper that Mr. Jennings signed on the merits was an undisputed affidavit in response to defendants' motion for summary judgment.

Nonetheless, the district court imposed sanctions, solely under Rule 11, in the full amount of $84,113.01 sought by the attorneys for the school defendants, jointly and severally against both Mr. Gladden and Mr. Jennings, but not his daughter. According to the court, the case was "frivolous and without merit as

to all Defendants except Officer Stevens," as to whom the court concluded that "it cannot logically also rule that Plaintiffs' case ... was frivolous," since the court sent the claim against him to the jury. Pet. App. at 18a and n.7. The court stated that, as to all the defendants but Stevens, "there were no fact issues," *id.* at 19a, but it nonetheless concluded that the "lawsuit is frivolous because, under Plaintiffs' evidence, there was no basis in law for Plaintiffs to argue that any defendant, besides Stevens, violated Plaintiffs' constitutional rights." *Id.* The court justified its imposition of joint and several liability merely by observing that "[s]urely, the outcome was foreseeable to Plaintiffs' attorney, if not entirely plain to Plaintiff William Jennings himself." *Id.* at 22a.

Plaintiffs appealed both the merits and the sanctions to the Fifth Circuit, where they were represented solely by Mr. Gladden, who also appealed the sanctions imposed against him as counsel. That Court concluded that the school defendants were not liable on the merits because the sniffing did not constitute a search and the issuance of the warrant was an independent legal cause for the search that ended any liability that they might otherwise have had. Pet. App. at 31a-32a. The Court then rejected as a matter of law the argument that the school defendants were liable for the acts of the police. *Id.* It also found that the police officer was not liable, not because there was probable cause for the search, but because the officer's good faith belief in the existence of probable cause immunized him from actions for money damages. *Id.* at 34a.

As to sanctions, the Court recognized that it should not use hindsight in deciding whether conduct is sanctionable, but should base its ruling only on what was known when the complaint was filed and what a reasonable inquiry would have shown. *Id.* at 38a. Since virtually all of the facts were uncontested, the question for Rule 11 purposes, according to the Court, was whether the legal theories in the complaint "could fairly be said to have been unreasonable from the point of view both of existing law and its possible extension, modification or reversal." *Id.* at 40a. The Court then reviewed the theories relied on by the plaintiffs and the role of their attorney and the ACLU. From that review, it concluded that "it should have been clear at the outset to Jennings and his attorney" that the case was without merit. *Id.* at 41a.

The original opinion had three additional paragraphs on the sanctions issue, including a statement that it was a "close case with respect to sanctions." *Id.* at 42a. There was no separate discussion of the liability of Mr. Jennings, no doubt because his attorney never suggested to the Court that clients who do not sign pleadings should be judged differently under Rule 11 than the lawyer who represents them and signs the offending paper, or that clients should not be held liable for the erroneous legal conclusions of their licensed attorneys. Following a petition for rehearing, the Court deleted those three paragraphs and inserted a paragraph which now appears as the indented paragraph on pages 321-22 of 877 F.2d 313 (5th Cir. 1989), Pet. App. at 44a-45a, remanding the case for consideration of the appropriate amount of sanctions in light of *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) (*en banc*). A petition for a writ of certiorari was denied, as was a motion to recall the mandate, Pet. App. at 51a.

On remand, without allowing any opportunity for the submission of evidence, further briefing, or oral argument, the district court issued an opinion that cut the $84,113.01 sanction in half, but continued to impose it jointly and severally against both attorney and client. The trial judge quoted the remand order that required him to consider "Rule 11's purpose[s] of education, compensation and deterrence," Pet. App. at 47a, and he recognized that he should impose "the least severe sanction adequate to serve the purpose of Rule 11." *Id.* In the apparent belief that the existence of undisputed facts was a factor to be held against attorneys and clients who file a suit that lacks legal merit, the court stated that "Plaintiffs knew all the pertinent facts prior to filing this action and the outcome of the trial was surely foreseeable to Jennings and his counsel." *Id.* at 49a. The court found that defendants had satisfied their obligation to mitigate damages by filing motions for summary judgment, recognizing that it should have been more clear that it would have granted summary judgment to the school defendants in response to a renewed motion if they had introduced a minimal amount of further evidence into the record. *Id.* at 48a. However, the court found that defendants had not satisfied their obligation to give plaintiffs notice that Rule 11 was being violated. On the basis of that failure,

it ordered the sanctions cut in half. *Id.* at 49a. Plaintiffs' timely motion to amend was denied in a three paragraph order, which contained no reasons for the ruling, and which was signed on the same day that the motion was filed. *Id.* at 50a.

Both petitioner and Mr. Gladden then appealed, with petitioner for the first time being represented by separate (undersigned) counsel. A new panel heard the case and found that the district court had erred (a) in arbitrarily cutting the award in half, rather than giving a reasoned analysis of why this was the least severe sanction adequate to serve the purposes of Rule 11, (b) in finding that defendants had failed to give notice of the claimed defect in the complaint, and (c) in holding appellants liable for any fees after the district court denied summary judgment in circumstances in which summary judgment should have been granted. The panel specifically found that the sanctioned conduct "consists of signing the complaint without making a reasonable inquiry into the law underlying the claim," Pet. App. at 4a, but refused to consider whether Mr. Jennings could be held liable for the error of law committed by his attorney because the panel believed that the issue was "foreclosed by this Court's partial affirmance in our prior opinion." *Id.*

The panel then quoted from the earlier remand direction and reviewed the activities of the district court in purported compliance with it, finding them to be seriously deficient. While the panel discussed the possibility of sanctions other than attorney's fees, and discussed the duty of the district court to exercise discretion in imposing sanctions, it declined to remand the case, believing that it was able to fix an appropriate amount of fees based on the existing record. However, the panel refused to address the issue of whether requiring the payment of all the attorney's fees arising from a legally meritless complaint was appropriate against a client who is not an attorney and who did not sign the complaint. The panel then awarded $21,539.95, which constituted all of the fees for the time spent prior to the denial of summary judgment, jointly and severally against both appellants. Proclaiming its distaste for the case with a reminder that it had been "in litigation for over six years," the panel announced that the "intent of our opinion today is to bring the proceedings to a

close." Pet. App. at 9a.

Despite this warning, both petitioner and Mr. Gladden filed for rehearing by the panel, limited to a narrow issue on which the panel had misread the record. The panel had awarded $6,817.76 in fees to respondent Security Associates International ("SAI") on the theory that it had expended this amount in its defense through the time that summary judgment had been improperly denied. The rehearing petition pointed out that SAI had not been originally sued by plaintiffs, that it had been impleaded by another defendant, and that plaintiffs had obtained permission from the district court to add SAI as a defendant *after* summary judgment had been denied. Thus, the petition pointed out, even under the panel's approach, SAI was not eligible for fees, and the award to it could only have been based on a misreading of the record. True to its stated intent, the panel denied the petition without explanation. Pet. App. at 54a.

Petitioner Jennings also filed a petition for rehearing *en banc*, seeking review on the issue presented in this petition, which the second panel said was foreclosed by the prior panel decision. He also asked for rehearing *en banc* on an issue not presented to this Court -- whether a sanction award of more than $21,500 against a client, represented by counsel, for an error of law, can ever be "the least severe sanction" adequate to serve the purposes of Rule 11, under the Fifth Circuit's *en banc* ruling in *Thomas v. Capital Security Systems, Inc.*, *supra*. Like the petition for panel rehearing, this too was rejected without explanation or dissent. *Id.*

REASONS FOR GRANTING THE WRIT

This petition concerns the circumstances under which a client, represented by a licensed attorney, may be held liable for the payment of attorney's fees under Rule 11. The question is in two parts: Under what circumstances may a client who does not sign any of the papers found to violate Rule 11 be required to pay the other side's attorney's fees? May a client be held liable under Rule 11 where the basis for sanctions is his attorney's failure to make a reasonable inquiry into the law? Both issues were addressed, although not definitively resolved, in this Court's

recent decision in *Business Guides, Inc. v. Chromatic Comm. Enter., Inc.*, 111 S. Ct. 922 (1991), which the Court of Appeals wholly disregarded.

Liability of a Nonsigning Client. In *Business Guides* this Court held that a represented client has an obligation to conduct an objectively reasonable inquiry into factual matters set forth in pleadings which the client has personally signed. In upholding that obligation, the Court specifically noted that "[w]e have no occasion to determine whether or under what circumstances a *nonsigning* party may be sanctioned." 111 S. Ct. at 935 (emphasis added). In this case, the Fifth Circuit upheld, without discussion, the imposition of sanctions on petitioner Jennings, despite the fact that he signed no papers on the merits other than an undisputed factual affidavit submitted in opposition to the defendants' summary judgment motion. *See* Pet. App. at 4a.

This Court explicitly tied its decision to uphold sanctions against a client in *Business Guides* to the client's signature on filed pleadings. Throughout that opinion, the Court focused on the plain language of Rule 11 that places a duty of inquiry on everyone who signs a pleading, motion, or other paper -- including a represented client. The Court held that, although a client need not sign any such papers, *if* he does so, he must make the reasonable factual inquiry required by Rule 11. The Court relied primarily on the plain language of Rule 11 itself "which sets up a means by which litigants certify to the court, *by signature*, that any papers filed are well founded." 111 S. Ct. at 928 (emphasis added). Later in the opinion, the Court stated that, "[i]n addition to being the most natural reading, it is an eminently sensible one. The essence of Rule 11 is that *signing* is no longer a meaningless act; it denotes merit. A *signing* sends a message to the district court that this document is to be taken seriously." *Id.* at 930 (emphasis added). In addition to *Business Guides*, this Court has also strictly adhered to the signing requirement in *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989), where it ruled that only the attorney who signed the pleading -- not the law firm whose name also appeared on the pleading, and on whose behalf the attorney purported to sign -- could be held liable under Rule 11. Thus, while the Court has not explicitly decided

the full extent of a client's obligations under Rule 11, it has strongly indicated that any Rule 11 obligation on a client derives from his signature, not from his status as the client of a signing attorney.

To be sure, clients may be held liable under the separate "improper purpose" prong of Rule 11, or pursuant to a court's inherent powers, without regard to whether a pleading was signed. *See Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991). The *Advisory Committee Notes to Rule 11*, 97 F.R.D. 165 (1983), specifically envisioned liability on a nonsigning client who acts wrongfully: "Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on a client" (*citing Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1089 (2d Cir. 1977) (a lawyer's sanctionable bad faith rendered his clients liable only if "they personally were aware of or otherwise responsible for the procedural action instituted in bad faith. Otherwise, such awards may be assessed only against [the attorney]."). However, sanctions predicated on the improper purpose or intentionally wrongful conduct of Mr. Jennings personally are not at issue here. The conduct that the Court of Appeals found had violated Rule 11 was solely a failure of Mr. Jennings' counsel: "[i]n this case, [the sanctionable] conduct consists of signing the complaint without making a reasonable inquiry into the law underlying the claim." Pet. App. at 4a.[1]

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[1] In its first sanctions opinion, the district court stated that Mr. Jennings' "only purpose in bringing the suit was to harass all the defendants," Pet. App. at 22a, thereby suggesting an improper purpose. On remand, the district court did not reiterate that finding, nor did it provide any basis for its characterization beyond a general reference to Mr. Jennings' testimony. For these reasons alone, it cannot be the basis for a finding of improper purpose. Moreover, read in context, it is clear that the alleged "harassment" was no more than the decision to litigate a constitutional issue that the court believed was without merit. There is not a shred of evidence in the record of any ulterior motive that Mr. Jennings had against any of the defendants, or even evidence that he knew them or had any prior relationships with them that would have caused him to bring this lawsuit. Nor is there any indication that Mr. Jennings' intent in bringing this suit was anything other than to obtain relief from a search he considered unconstitutional. Indeed, Mr. Jennings' unrebutted affidavit submitted on the sanctions motion denied any improper purpose, and there is simply no evidence to the contrary.

Despite *Business Guides*' focus on the act of signing, the court below imposed liability on Mr. Jennings, a nonsignatory, without discussion. *See also Homico Construction v. Ti-Bert Systems*, 939 F.2d 392, 394 (6th Cir. 1991) ("a *non-signing* party may be sanctioned under the 'represented party' clause of Rule 11 if it is determined that his attorney has filed a pleading or other paper which is [factually or legally] frivolous *or* filed for an improper purpose" (latter emphasis added)). This case provides the Court with an opportunity to clear up confusion and inattention in the lower courts to the issue specifically left open in *Business Guides*: where there is no improper purpose or other wrongful conduct, may a represented, nonsigning client be liable for his lawyer's failure to make a reasonable inquiry?

This is an important issue, vitally affecting the vast majority of clients who do not sign any papers, especially complaints. Justice Kennedy's dissent in *Business Guides* specifically noted the problems raised by imposing Rule 11's burden of inquiry on clients, which he believed, contrary to the holding below, applies only to those clients who are "ignorant enough to sign a pleading or other Rule 11 paper." 111 S. Ct. at 941. Moreover, this issue is of great practical significance: clients need to know whether they may be liable for failing to make reasonable inquiries even when they do not sign pleadings, or if they are liable as nonsigners only when they have acted with bad faith or for an improper purpose.

Client Liability for Errors of Law. Assuming, *arguendo*, that a nonsigning client may be held liable for failure to make a reasonable inquiry, a question remains as to whether a party (signing or non-signing) may be held liable for the legal error of his attorney. *Business Guides* decided the liability issue when questions of fact are at issue; this petition raises the same question when the alleged failure to make a reasonable inquiry involves questions of law.

In dicta, *Business Guides* addressed this issue and suggested a very limited obligation concerning questions of law for the ordinary, represented client such as Mr. Jennings:

> Of course, represented parties may be less able to investigate the legal basis for a paper or pleading. But this is not invariably the case. Many corporate clients, for example, have in-house counsel who are fully competent to make the necessary inquiry. Other party litigants may have a great deal of practical litigation experience. Indeed, Business Guides itself is no stranger to the Court; it is a sophisticated corporate entity that has been prosecuting copyright infringement actions since 1948. App. 105-106. The most that can be said is that the legal inquiry reasonably expected from a party may vary from case to case. Put another way, "what is objectively reasonable for a client may differ from what is objectively reasonable for an attorney." 892 F.2d at 810.

111 S. Ct. at 933. In effect, Mr. Jennings was held to have acted objectively unreasonably for his failure to perform independent legal research regarding his attorney's legal theory of the case.

The Court of Appeals refused even to address this issue, citing its prior opinion upholding joint liability. Pet. App. at 4a. The Court did this despite the fact that Mr. Jennings was not separately represented in the first appeal. But, as a number of courts have noted in holding that clients cannot be adequately represented by their attorneys in opposing motions for joint sanctions, there is "an obvious conflict of interest between the [clients] on the one hand and their counsel, on the other, on the issue of who should be liable for sanctions imposed by the district court." *White v. General Motors Corp.*, 908 F.2d 675, 685 (10th Cir. 1990). Indeed, *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1473, 1475 (2d Cir. 1988), *reversed on other grounds sub nom. Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989), went so far as to reinstate, *sua sponte*, a client's appeal from imposition of Rule 11 sanctions because the "entire Rule 11 proceeding against [the client] was thoroughly tainted by the [lawyer's] representation of him notwithstanding a self-evident conflict of interest." *See also In Re Ruben*, 825 F.2d 977, 985 (6th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988) ("an inherent problem [exists] in a sanction hearing addressed to both a plaintiff and her

attorneys, where the plaintiff and attorneys are not separately represented"); *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 505 n.3 (3d Cir. 1991).

Moreover, even if a court were ordinarily justified in adhering to a prior panel's decision, it surely could not do so in the face of the intervening *Business Guides* decision, which indicated that the burden of legal inquiry on an ordinary client such as Mr. Jennings is minimal. Both the panel and the full Court on petition for rehearing *en banc* were directed to that language, but simply disregarded it.

The Court of Appeals apparently found the duty of the lawyer and the duty of the client regarding legal matters to be identical since it never provided a separate analysis of their obligations on questions of law. This is in direct conflict with the discussion in *Business Guides* that explicitly endorsed the approach of the Ninth Circuit in that case, emphasizing the significantly differing standards of objective reasonableness between an attorney and a client. 111 S. Ct. at 933. Furthermore, imposing liability on Mr. Jennings would be inconsistent with this Court's approach in *Pavelic*, where it observed that the "purpose of Rule 11 as a whole is to bring home to the individual signer his personal non-delegable responsibility . . . to validate the truth and *legal reasoning* of the papers filed . . .." 493 U.S. at 126. *See also* the opinion of Marshall, J., dissenting, focusing on improper behavior as the proper basis for sanctions, *id.* at 130.

In addition to being inconsistent with the opinions of this Court, the approach taken by the Fifth Circuit, which entirely disregards the relative responsibilities of the lawyer and client, conflicts with the approach taken by numerous other courts, under which Rule 11 sanctions are imposed solely on the party actually at fault for failing to make a reasonable inquiry. Several courts have applied this general principle to cases analogous to this one, specifically stating that sanctions for failing to make a reasonable *legal* inquiry are properly imposed *only* on an attorney, rather than jointly on the client and attorney, absent some unusual circumstance of the kind hypothesized in *Business Guides*. Thus, the Seventh Circuit in *Borowski v. DePuy*, 850 F.2d 297, 305 (1988),

canvassed many of these decisions and provided a helpful framework for analysis:

> Courts seek to allocate sanctions between the attorney and the client according to their relative responsibility for the Rule 11 violation. See *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir. 1985); *Bastien v. R. Rowland & Co.*, 116 F.R.D. 619, 621-22 (E.D.Mo. 1987); *Eastway Constr. Corp. v. City of New York*, 637 F.Supp. 558, 569 (E.D.N.Y. 1986). Moreover, courts generally impose sanctions entirely on counsel when the attorney has failed to research the law or is responsible for sharp practice. See *Ruben v. Warren City Schools*, 825 F.2d 977, 986 (6th Cir. 1987) (court reversed sanctions imposed on plaintiff for her bad faith in filing a suit, explaining that if any fault existed, it lay with the attorneys); *Quiros v. Colon*, 800 F.2d 1, 2-3 (1st Cir. 1986). The rationale behind this is that the attorney and not the client should bear the sanction for filing papers which violate Rule 11 by being unsupported by existing law, or as an attempt to modify well-settled law.

Numerous other courts have applied the principle of fault-based imposition of sanctions on the person actually responsible for the inadequate inquiry. The Second Circuit did so in *United States v. International Brotherhood of Teamsters*, 948 F.2d 1338, 1347 (1991), making explicit the obligation of the district court to differentiate the responsibilities of the client and lawyer under both Rule 11 and 28 U.S.C. § 1927 on the different issues presented. The Tenth Circuit has held that "[s]anctions ... must be imposed on the party responsible for the violation," and that "the trial court erred in not making specific findings on the degree of fault among the sanctioned plaintiffs to permit us to determine whether joint and several liability is justified." *White*, 908 F.2d at 683 (citation omitted); *id.* at 685-86 (same re joint liability of counsel and client). *See also Paine-Webber, Inc. v. Can Am Financial Group, Ltd.*, 121 F.R.D. 324 (N.D.Ill.), *aff'd*, 885 F.2d 873 (7th Cir. 1988) (trial court must determine relative fault of client and attorney and apportion fees accordingly).

The First Circuit has also adopted the fault-based approach to apportioning sanctions for legal error in *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 607 (1988):

> [T]he district court did not specify whether the [clients] or their counsel should pay the [Rule 11] counsel fees. Our reading of the record indicates that the sanction should be imposed on counsel.... [T]here is no reason to think that [the clients] (as non-lawyers) would reasonably understand whether, or why, a fraud charge should be brought against [the defendants].

Accord, Quiros v. Hernandez Colon, 800 F.2d 1, 2-3 (1st Cir. 1986); *Ortiz Villafane v. Segarra*, 797 F.2d 1, 2 (1st Cir. 1986). The reasons for this approach were aptly put in two district court decisions: "Attorneys are specially trained to examine existing law in light of the facts presented. The attorney must bear the sanction for filing a complaint which violates Rule 11 by being unsupported by the law invoked in the complaint." *Henry v. Farmer City State Bank*, 127 F.R.D. 154, 159 (C.D.Ill. 1989). "[T]he court does not choose to sanction [the clients] because there seems little value or deterrence in sanctioning a party for an attorney's failure to reasonably investigate the law." *Harrison v. Dean Witter Reynolds, Inc.*, 132 F.R.D. 184 (N.D.Ill. 1990).[2]

Nonetheless, the Fifth Circuit has rejected this fault-based approach, both in this case and elsewhere. *See Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1131 (5th Cir. 1987) (no abuse of discretion in imposing joint liability on nonsigning client and attorney for attorney's failure to realize that *res judicata* would apply); *Southern Leasing Partners, Ltd. v. McMullan*, 801

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[2] Numerous other trial courts have applied this fault-based approach in deciding whom to sanction. *See Allen v. Utley*, 129 F.R.D. 1, 9 (D.D.C. 1990); *Patterson v. Alaska Airlines, Inc.*, 756 F. Supp. 476, 480 (W.D.Wash. 1990); *Slane v. Rio Grande Water Conservation District*, 115 F.R.D. 61, 63 (D.C.Colo. 1987) ("This court will not hold laymen responsible for fees, when it is apparent that competent counsel would have advised them that their claims are without merit."); *Anschutz Petroleum Marketing v. E.W. Saybolt & Co.*, 112 F.R.D. 355, 358 (S.D.N.Y. 1986); *Blake By and Through Blake v. National Casualty Co.*, 607 F. Supp. 189, 193 (D.C.Cal. 1984).

F.2d 783, 789 (5th Cir. 1986) ("Counsel's inadequate inquiry into the merits of these claims ... fails to meet the Rule [11 standard] and the district court did not abuse its discretion in sanctioning both [the client] and its attorneys"). The Eleventh Circuit, in *Ortho Pharmaceutical Corp. v. Sona Distributors*, 847 F.2d 1512, 1518 (1988), has apparently taken the same approach, upholding sanctions imposed on both client and attorney based on the fact that "[t]he prefiling inquiry of ... counsel [regarding personal jurisdiction] was unreasonable under the circumstances." One commentator has noted this split in the Circuits on whether clients can be sanctioned for failure to ascertain the legal basis for a claim and has urged that limiting sanctions to the lawyer "is especially appropriate." Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 227 (1988).

Here, Mr. Jennings did precisely what clients are expected to do. He took his grievance to an attorney and followed his attorney's advice. The only deterrent effect that sanctions would have here is to dissuade Mr. Jennings and others from going to court, or even going to an attorney at all, precisely what the authors of amended Rule 11 feared might occur and believed that they had eliminated from Rule 11 as they had drafted it. *See Advisory Committee Notes to Rule 11*, 97 F.R.D. 165, 199 (1983). Plainly, Mr. Jennings did nothing for which he should have been sanctioned. Accordingly, for that reason, as well as to resolve the division in the Circuits and to clarify the standard for nonsigners as to inquiries of law after *Business Guides*, review is warranted.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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April 6, 1992

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* The extensive assistance of Jonathan Romberg, a third year student at Northeastern University School of Law, is gratefully acknowledged.

No. 90-7004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIAM F. JENNINGS,
Plaintiff-Appellant,

and Don Gladden, Appellant,

[V.]

JOSHUA INDEPENDENT SCHOOL DISTRICT,
et al, Defendants-Appellees,

Francesca Raines and Royce Ingersoll,
etc, Defendants-Third Party
Plaintiffs-Appellees,

Security Associates International,
Third Party Defendants-Appellees

Appeal from the
United States District Court
for the Northern District of Texas

(December 10, 1991)

Before CLARK, Chief Judge, WILLIAMS and
BARKSDALE, Circuit Judges

CLARK, Chief Judge:

This appeal challenges sanctions imposed under Federal

Rule of Civil Procedure 11. The district court initially imposed a sanction of $84,113.01 in attorneys' fees jointly against attorney Don Gladden, and his client, William Jennings. We vacated and directed the district court on remand to reconsider its sanctions in light of our intervening decision in Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866 (5th Cir. 1988) (en banc). In response to our mandate, the court imposed fees of $42,656.51 jointly against Jennings and Gladden. We vacate that last judgment and impose attorneys' fees jointly and severally against Gladden and Jennings in the amount of $21,539.95.

I.

The facts are thoroughly detailed in our prior opinion, Jennings v. Joshua Indep. School Dist., 877 F.2d 313, 314-16 (5th Cir. 1989) (on rehearing). In sum, the action challenged the constitutionality of a policy instituted by the Joshua Independent School District [JISD]. To educate students about the dangers of drugs, alcohol, and weapons and to deter the bringing of such items to school, JISD used trained dogs to sniff cars in the high school's parking lot. If the dog alerted at a car, the dog handler accompanied by the assistant principal would ask the car's owner to consent to a search. If the owner refused to sign the written consent form, policy required that the school turn the matter over to the police.

When a trained dog targeted a car driven by the high school daughter of Plaintiff Jennings, she refused to consent to a search of the vehicle. Jennings also declined to allow a search of his car. The school called the police who investigated the matter, determined there was probable cause to search the vehicle, and obtained a valid search warrant. The search proved negative.

Jennings employed Gladden to represent him in challenging the policy. Gladden filed a complaint under 42 U.S.C. Section 1983 seeking damages from JISD, school officials, the owner of an investigating service, the contractor who supplied the dogs, the dog handler, and the police officer who conducted the search. The district court denied the defendants' motions for summary judgment. At the close of a five-day trial, the court entered a directed

verdict in favor of all the defendants except the police officer. A jury found in his favor.

The defendants sought the full amount of their attorneys fees under 42 U.S.C. Section 1988, and, in the alternative, sought to recover such fees as a sanction under Fed.R.Civ.P. 11. The district court imposed the defendants' total attorneys fees amounting to $84,113.01 as a Rule 11 sanction against both Gladden and Jennings. The court held that the lawsuit was frivolous because plaintiff's evidence furnished no basis for asserting that any defendant, other than the police officer, violated plaintiff's constitutional rights and that outcome was foreseeable by plaintiff's attorney, if it was not entirely plain to plaintiff Jennings. Jennings and Gladden appealed.

On that first appeal, this Court upheld the district court's joint imposition of Rule 11 sanctions against both Jennings and Gladden. On rehearing, we vacated the sanctions imposed by the court for reconsideration in light of our intervening ruling in Thomas v. Capital Sec. Serv. Inc., 836 F.2d 866 (5th Cir. 1988) (en banc). The Court stated:

Given the amount of the sanction, we ask that the district court address Thomas's mitigation and notice requirements, as well as Thomas's command that the sanctions imposed be the least severe sanctions adequate under the circumstances to promote Rule 11's purposes of education, compensation and deterrence. We do this in keeping with Thomas's statement that "[i]f the sanctions imposed are substantial in amount, type or effect, appellate review of such awards will be more rigorous," 836 F.2d at 883. We wish to make certain that the district court's justification of the Rule 11 decision in the record corresponds to the amount, type and effect of the sanction imposed, before reviewing that record and decision for abuse of discretion. See Thomas, 836 F.2d at 883.

Jennings v. Joshua Indep. School Dist., 877 F.2d 313, 321-22 (5th Cir. 1989) (on rehearing).

On remand, the district court reduced by one-half the

amount of the joint and several award against Jennings and Gladden. Jennings and Gladden again appeal. We vacate and render.

II.

Rule 11 imposes on trial courts an objective standard of reasonableness under the circumstances. Business Guides, Inc. v. Chromatic Commun. Enter., Inc., ___ U.S. ___, 111 S.Ct. 922, 931-32, 112 L.Ed.2d 1140 (1991); Thomas, 836 F.2d at 873. The reasonableness of the conduct involved is to be viewed at the time counsel or the party signed the document alleged to be the basis for the Rule 11 violation. In this case, that conduct consists of signing the complaint without making a reasonable inquiry into the law underlying the claim. Our review is limited to testing for abuse of discretion. Cooter & Gell v. Hartmarx Corp., ___ U.S. ___, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990); Thomas, 836 F.2d at 871-73.

Jennings contends that he should not be held liable. He asserts that the material facts have never been disputed. The responsibility for researching the law and evaluating the legal merits of the claim lay with his lawyer, not him. This panel is not at liberty to evaluate the factual basis of this contention. Any review of Jennings' joint and several liability is foreclosed by this Court's partial affirmance in our prior opinion. Jennings, 877 F.2d at 321.

The legal basis for such joint liability was made clear. Both Gladden and Jennings failed to conduct a reasonable inquiry into the facts or law before filing the lawsuit. Gladden filed the pleadings and Jennings signed a sworn affidavit to oppose the defendants' motion for summary judgement. Jennings' only purpose in bringing this action was to harass the defendants. Jennings, 877 F.2d at 320.

In Business Guides, the Supreme Court held that an attorney, represented party, or pro se litigant who signs a pleading or other paper or affidavit without first conducting a reasonable inquiry may be liable for Rule 11 sanctions. 111 S.Ct. at 928-931.

The notes of the Advisory Committee pertaining to the 1983 amendment of Rule 11 state:

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides.... Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client.

Fed.R.Civ.P. 11 advisory committee's note (emphasis added). The district court had discretion to impose sanctions on Jennings as well as Gladden.

Once the court determines that a violation of Rule 11 has occurred, the court "shall" impose sanctions. As Thomas aptly noted, "[t]here are no longer any free passes for attorneys and litigants who violate Rule 11." 836 F.2d at 876. "[T]he district court should carefully choose sanctions that foster the appropriate purpose of the rule, depending upon the parties, the violation, and the nature of the case." Thomas, 836 F.2d at 877.

Our mandate on the initial appeal asked the district court to consider the new teachings of Thomas and "address Thomas's mitigation and notice requirements, as well as Thomas's command that the sanctions imposed be the least severe sanctions adequate under the circumstances to promote Rule 11's purpose of education, compensation and deterrence." Jennings, 877 F.2d at 321-22.

The issue on this present appeal is whether the district court abused its discretion in continuing to impose Rule 11 sanctions in the form of attorney fees against Jennings and Gladden, albeit reducing the amount of such sanctions by one-half.

Our remand contemplated that the district court would give the matter of appropriate sanctions sufficient additional consideration in light of Thomas to enable us to review the court's justification, not just the amount, but also the "type and effect of

the sanction imposed" before we review the record and the district court's decision for abuse of discretion. Jennings, 877 F.2d at 322.

The order entered by the district court on remand states that (1) "Defendants did attempt to mitigate their costs by filing motions for summary judgment," (2) the record was "devoid" of any evidence that defendants attempted to notify plaintiffs that their pleadings might be subject to Rule 11 sanctions, and (3) attorneys' fees were an appropriate sanction. The court reduced the award by one-half because of defendants' failure to notify plaintiffs.

Thomas does not require a court to make specific findings and conclusions in every Rule 11 case, but Thomas noted that findings and conclusions "assist in appellate review, demonstrating that the trial court exercised its discretion in reasoned and principled fashion, [and] help assure the litigants, and incidentally the judge as well, that the decision was the product of thoughtful deliberation." Thomas, 836 F.2d at 883. Our remand order made this proceeding different. We asked for findings which would permit proper evaluation of the district court's action in a newly developed area of law.

Thomas places an affirmative duty upon a party to give prompt notice to the court and the alleged offending party when it is believed that a pleading has been filed in violation of Rule 11. Thomas, 836 F.2d at 879. Although a party may give notice to the court and offending party in a variety of ways including informal telephonic discussions with counsel opposite, a letter, or a Rule 11 motion, the preferable method is a formal written notice which can be included in he record for appellate review. Thomas, 836 F.2d at 880; Donaldson v. Clark, 819 F.2d 1151, 1560 11th Cir. 1987).

The district court's finding that the record contained no evidence of notice is in error. The record discloses that defendants' original answer stated:

Your Defendants would show that Plaintiff's suit is

> without substantial merit and is filed in bad faith for purposes of vexation, abuse, or in an attempt to harass or embarrass Defendants. Accordingly, Defendants are entitled to an award of reasonable attorney's fees for their defense herein.

At oral argument counsel points out that the district court made its ruling without the benefit of briefs or appearance of counsel following remand. In the pre-Thomas setting in which it was written, the language in defendants' answer constituted adequate notice.

On remand, the district court held that the defendants met their duty to mitigate their costs by filing motions for summary judgment. We agree. Although the district court denied the defendants' motions for summary judgment, he explained in his Order of January 5, 1988, at 8 n.6 and again in his Order of October 19, 1990, at 3-4 that he thought the defendants would refile their motions after development of further evidence. Unfortunately, the judge did not express that expectation to the defendants. Given such lack of communication, the defendants were not at fault for failing to resolve this case by a second motion for summary judgment.

Discretion is vested in the trial court to determine the type and amount of sanctions once the court finds a violation of Rule 11. Thomas, 836 F.2d at 878. That discretion, however, is not unlimited and is subject to appellate review. Our mandate asked for sufficient explanation of the district court's decision on remand to permit our review to be meaningful. The order on remand cryptically stated that an award of one-half of defendants' attorneys' fees "is the least severe sanction adequate to serve the purpose of Rule 11." The only elaborations were statements that the court found plaintiffs knew all the pertinent facts before filing the action and that the outcome of the action was "surely foreseeable to Jennings and his counsel." While the district court's choice to impose monetary sanctions was not an abuse of discretion, its determination that an arbitrary percentage of all fees incurred constituted the least severe sanction was based on errors of fact and law. The one-half reduction from fees originally assessed was

made because the court thought defendants had not given any notice. This was factually wrong. The countervailing legal errors are discussed below.

The discretion vested in the trial court is granted so its thoughtful exercise will carry out the educational and deterrent functions of the rule. Thomas, 836 F.2d at 877. Rule 11 does not compel the shifting of fees as a sanction, nor is full compensation a rigid requirement in every case. Thomas, 836 F.2d 877. Private or public reprimands or fixed compensatory or punitive fines may be less severe and equally or more effective. Thomas, 836 F.2d at 878. See also proposed Amendments to Fed.R.Civ.P. and Fed.R.Evd., 137 F.R.D. 53, 74-82 (1991) (preliminary draft of proposed amendments to FED.R.Civ.P. 11(c)(2) and advisory committee's notes.) Since compensatory sanctions under Rule 11 have been approved in today's case the amount of such sanctions should be limited to expenses directly caused by the filing of the baseless complaint in the district court. Cooter & Gell v. Hartmarx Corp., 110 S.Ct. at 2461. Halving an award of all attorneys' fees incurred in the litigation does not indicate an exercise of discretion to find the point of least severe sanctions. The district court acknowledged this action could have been disposed of by a properly supported motion for summary judgment. Furthermore, it is difficult to understand how this wholly frivolous action could have survived any motion for summary judgment. The fees attributable to plaintiff's pleading ended with the court's ruling on that motion. Thus, fees incurred prior to the time the district court overruled the defendants' motion for summary judgment were the appropriate least severe sanction. This discrete point was the logical place to stop such compensation.

Because the record on appeal contains precise daily time records of fees incurred, we are able to fix the amount of such fees here. On November 7, 1986 the district court denied the motions for summary judgment of the school defendants and the dog handlers, and on January 28, 1987 the district court denied the dog contractor's motion for summary judgment.

It is ORDERED that Plaintiff William Jennings and his attorney of record, Don Gladden, pay to the named defendants

the amounts indicated to reimburse those defendants for fees and costs incurred in this action: 1) to Joshua Independent School District, Charles Greenawalt, and Larry Loftin: $8,715.70; 2) to Francesca Raines and Royce Ingersoll d/b/a Institute of Criminal and Civil Investigation: $6,006.49; 3) to Security Associates International: $6,817.76.

The appeal did not lack merit. We decline to award damages and costs under Rule 38, Federal Rules of Appellate Procedure. This case has been in litigation for over six years. The intent of our opinion today is to bring the proceedings to a close.

The judgment of the district court is VACATED and judgment is RENDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. CA3-85-1700-T

WILLIAM F. JENNINGS and
NAOMI JENNINGS

v.

JOSHUA INDEPENDENT SCHOOL DISTRICT,
CHARLES GREENAWALT, Individually
and in his official capacity,
LARRY LOFTON, in his official capacity,
OFFICER DAVID STEVENS,
FRANCESCA REINES, and
ROYCE INGERSOLL, d/b/a THE INSTITUTE OF
CRIMINAL AND CIVIL INVESTIGATION

v.

SECURITY ASSOCIATES INTERNATIONAL

ORDER

The following are (1) a list of uncontroverted facts in this case; (2) this Court's Conclusions of Law as to directing a verdict for all defendants except Stevens, and (3) Findings of Fact and Conclusions of Law as to attorneys' fees.

UNCONTROVERTED FACTS

1. Defendant Joshua Independent School District (JISD) employed Defendant Charles Greenawalt as its superintendent. Greenawalt was at Joshua High School on March 29, 1985, when the events that are the basis of this lawsuit

occurred.

2. Defendant Larry Lofton was a vice-principal at the high school on March 29 1985. He was present when the events that are the basis of this lawsuit occurred.

3. Defendant Officer David Stevens was, on March 29, 1985, a police officer employed by the City of Joshua, Texas.

4. Defendant Francesca Reines was employed by Defendant Royce Ingersoll, d/b/a The institute of Criminal and Civil Investigations, as a dog handler.

5. Defendant Security Associates International (SAI), by contract with JISD, provided a sniffer-dog service to detect narcotics, marijuana, alcohol, firearms, ammunition, and pyrotechnics on campus.

6. Royce Ingersoll d/b/a The Institute of Criminal and Civil Investigations negotiated the contract. Royce Ingersoll d/b/a The Institute of Criminal and Civil Investigation was not acting as an agent of SAI in fulfilling the contract between JISD and SAI, but as an independent subcontractor.

7. On March 29, 1985, Francesca Reines, an employee of Ingersoll was conducting a walkthrough at the school parking lot at the Joshua Independent School District High School with a dog named King. King alerted on nine automobiles, one of them belonging to Plaintiff William Jennings and driven to school that day by his daughter, Plaintiff Naomi Jennings.

8. King would alert to narcotics including marijuana, alcohol, pyrotechnics, prescription drugs, over-the-counter drugs including Excedrin and antihistamines, firecrackers, ammunition, firearms, beer bottle caps, empty beer bottles, and caps from a toy cap pistol. King would also alert to "dead scents," meaning the dog would alert to a vehicle that no longer contained any of the above items, with the items having been removed as many as two to three weeks before.

9. Naomi Jennings was asked to sign a consent to search form and she refused. Her father later came to the scene and he also refused to permit a search.

10. The police officer, David Stevens, responded to the call. He conducted an independent investigation at the scene.

11. Francesca Reines provided information to Officer Stevens at his request regarding her activity and the activities of the dog. At Officer Stevens' request, she accompanied him to the County Attorney's office to answer any questions the County Attorney might want to ask.

12. Each of the Defendants, JISD, Greenawalt, Lofton, and Reines, supplied true information to Officer Stevens in response to his questions.

13. Officer Stevens left the parking lot to meet the County Attorney and discuss whether Officer Stevens should submit an application for a search warrant.

14. After Officer Stevens left, Lofton and Plaintiffs sat in a vehicle (other than the one that Naomi Jennings had driven to school) and waited for Officer Stevens to return. Plaintiffs retained their keys to the car that Naomi Jennings had driven to school. On two occasions after the dog had alerted on the car, Naomi Jennings unlocked and entered the car. On one occasion, she examined the car's glove compartment to see whether it contained shotgun shells. On the other occasion, she removed a jacket. Naomi Jennings' person was never searched.

15. Officer Stevens presented his findings to the County Attorney. The County Attorney questioned both Officer Stevens and Francesca Reines about the facts.

16. The County Attorney concluded that there was sufficient evidence to apply for a search warrant. He directed the preparation of an affidavit for signature by Officer Stevens.

17. Officer Stevens signed and submitted the affidavit to Judge J.L. Phinney who determined that probable cause existed and issued a search warrant.

18. Officer Stevens then returned to the parking lot and searched the Jennings vehicle. He found no object the possession of which is prohibited by law or school policy.

19. Francesca Reines did not participate in the actual search of the Jennings vehicle.

20. Officer Stevens did not act pursuant to any customary or pre-existing plan with Defendants Reines, Ingersoll or JISD with regard to searching vehicles alerted on.

CONCLUSIONS OF LAW -- DIRECTED VERDICT

1. The use of trained dogs to sniff automobiles parked on public parking lots does not constitute a search within the meaning of the fourth amendment to the United States Constitution. Horton v. Goose Creek Independent School District, 690 F.2d 470, 477 (5th Cir. 1982), cert. denied, 463 U.S. 1207 (1983).

2. The mere furnishing of information to a police officer in the course of his investigation does not cause the person furnishing such information to act jointly or in concert with the police. Hernandez v. Schwegmann Bros. Giant Supermarkets, Inc., 673 F.2d 771, 772 (5th Cir. 1982); White v. Scrivner Corp., 594 F.2d 140, 143-144 (5th Cir. 1979); Benavidez v. Gunnell, 722 F.2d 615, 618 (10th Cir. 1983).

3. To be liable under section 1983, it must be shown that a defendant was personally involved in the act causing the deprivation of the constitutional right or that he has or is charged with having actual knowledge that his subordinates are causing the deprivation of the constitutional rights. Love v. King, 784 F.2d 708, 711 (5th Cir. 1986); Triplett v. Azorde-

gan, 570 F.2d 819, 823 (8th Cir. 1978). Since Defendants SAI, Francesca Reines, Royce Ingersoll d/b/a The Institute of Criminal and Civil Investigations, Charles Greenawalt, Larry Lofton, and JISD had no right, duty or obligation to control the actions of Officer Stevens, they were not personally involved or responsible for Officer Stevens' decision to seek a warrant or for the manner in which he prepared the affidavit. Further, since Officer Stevens was not their subordinate, neither are they chargeable with having actual knowledge that Stevens might cause a deprivation of anyone's constitutional rights.

4. No action by Royce Ingersoll d/b/a The Institute of Criminal and Civil Investigations violated any constitutional or other rights of Plaintiffs.

5. No action by Francesca Reines violated any constitutional or other rights of Plaintiffs.

6. No action by JISD, Greenawalt, and Lofton violated any constitutional or other rights of Plaintiffs.

7. No action by SAI violated any constitutional or other rights of Plaintiffs.

8. Defendant Royce Ingersoll d/b/a The Institute of Criminal and Civil Investigations is not liable to Plaintiffs under 42 U.S.C. Section 1983.

9. Defendant Francesca Reines is not liable to Plaintiffs under 42 U.S.C. Section 1983.

10. Defendants JISD, Greenawalt, and Lofton are not liable to Plaintiffs under 42 U.S.C. Section 1983.

11. Defendant SAI is not liable to Plaintiffs under 42 U.S.C. Section 1983.

FINDINGS OF FACT -- ATTORNEYS' FEES[1]

1. Time and Labor Required.[2]

A. The Court finds that the attorneys for the school defendants (JISD, Lofton, and Greenawalt) charged the following amount for hours actually expended, as broken down:

$43,107.50	Attorneys' fees through October 8, 1987[3]
1,800.70	Expenses through October 8, 1987
4,206.25	Attorneys' fees from October 9 to date of hearing[4]
$49,114.45	Total

The attorneys for the school defendants adequately itemize

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[1] The Court lists its findings of fact according to the factors listed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Only SAI's counsel framed its motion for attorneys' fees under this standard. As far as possible, however, the court here analyzes the case as to all Defendants' attorneys' fees under Johnson. Johnson held that the district court, in awarding attorneys' fees permitted under statute, must elucidate the factors which contributed to the decision to award fees. Id. at 717.

[2] The Court has reviewed the billing statements from the attorneys who represented the Defendants and found no duplication of effort and no unnecessary billing.

[3] Hours were expended as follows:

David Owen	206.55 @ $150 =	$30,982.50
Bruce Wilson	43.30 @ $125 =	5,412.50
Larry Thompson	47.50 @ $125 =	5,937.50
Tom Carr	1.00 @ $125 =	125.00
Mike Mitchell	6.50 @ $100 =	650.00
Total	304.85	$43,107.50

[4] Hours for this charge are as follows:

David Owen	16.00 @ $150.00 =	$2,400.00
Bruce Wilson	14.45 @ $125.00 =	1,806.25
Total Hours	30.45	$4,206.25

their expenses and hours in the billing statements they have submitted.

B. The Court finds that the attorney for SAI charged $13,323.56 for his services and expended over 140 hours on the case.[5] He adequately itemizes his expenses and hours in the billing statements submitted.

C. The Court finds that the attorney for Defendants Royce Ingersoll and Francesca Reines charged $21,675.00 total for his services and expended 216.75 hours on the case, billing at $100.00/hour. He adequately itemizes his expenses and hours in the billing statements submitted.

2. Novelty and Difficulty of the Questions.

Plaintiffs' suit raised certain novel questions involving constitutional law. However, much of the law favored Defendants and their task was simply an analysis of the case under existing law.

3. Skill Requisite to Preform the Legal Service Properly.

The case was not extraordinarily complex, although some questions raised were novel. The skill requisite to perform the legal services properly was reasonably high, but not extremely so.[6]

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[5] Attorney Seckel did all the work except as follows: J. W. George spent 6.50 hours on one deposition. John Hall spent 30 minutes and Susan Baldwin spent 45 minutes. Seckel initially billed at $85/hour, then later increased to $95/hour. George bills at $75/hour; Hall at $195/hour; and Baldwin at $140/hour.

[6] This lawsuit could have been disposed of on a motion for summary judgment from Defendants. Defendants filed a motion for summary judgment which was denied because "the reliability of the dog had not yet been affirmatively established". See Order Denying Summary Judgment, November 7, 1986. When it issued the Order, the Court expected that Defendants would refile motions for summary judgment and submit evidence as to the dog's reliability. Defendants never did this. In retrospect, the Court realizes that it could have expressed its thoughts about the motion for summary judgment more clearly and could have explained why it required evidence as to the dog's reliability.

4. Preclusion of other Employment.

SAI's attorneys were not precluded from taking other employment. As the other defense attorneys did not analyze their fees under Johnson, the Court cannot know whether they were precluded from taking other employment or not.

5. Customary Fees.

The fees charged were, in the Court's experience, customary.

6. Whether Fee is Fixed or Contingent.

All attorneys for Defendants charged a fixed fee as detailed above.

7. Time Limitations Imposed by the Client or Circumstances.

SAI's counsel, because SAI was brought into the suit after substantial discovery had been completed, was required to work suddenly to meet discovery and other deadlines already imposed. No other Defendants' attorney has analyzed this factor.

8. Amount Involved and Results Obtained.

The Court's judgment in this case is that Plaintiff take nothing from all Defendants. Plaintiffs failed to specify how many dollars they sought in damages.

9. Experience, Reputation, and Ability of Attorneys.

All attorneys for the defense enjoy good reputations and have substantial ability. Degrees of experience vary. Attorney Seckel has practiced approximately three years. The experience of the other attorneys is not in evidence.

10. Undesirability of the Case.

The case was not undesirable for the defense attorneys.

11. Nature and Length of Professional Relationship with the Client.

None of the attorneys analyzed this factor.

12. Awards in Similar Cases.

There was no award.

CONCLUSIONS OF LAW -- ATTORNEYS' FEES

1. Section 1988 -- Basis of Recovery of Attorney's Fees.

The Supreme Court has held that prevailing defendants may recover attorney's fees only upon a finding that the plaintiff's claim is frivolous, unreasonable, groundless, made in bad faith, or persisted in after it has become clear that the claim is any of those things. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

This Court concludes that Plaintiffs' case was frivolous and without merit as to all Defendants except Officer Stevens.[7] The Court so concludes even though it denied the motions of the various defendants for summary judgment.[8]

a. Prior Ruling on Defendants' Motions for Summary Judgment.

The Court denied Defendants' motions for summary judgment because no evidence was submitted as to the dog's ability to

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[7] Since the Court submitted two jury issues as to the liability of Defendant Stevens, it cannot logically also rule that Plaintiffs' case against Stevens was frivolous.

[8] Defendant Officer Stevens moved for summary judgment based on qualified immunity. This Court denied that motion. In reviewing it denial of the motion, the Court is not now convinced that its application of the law on qualified immunity was correct.

detect contraband. See Order Denying Summary Judgment, November 7, 1986. Lacking such evidence, the Court concluded that it had no alternative but to deny summary judgment.

At trial there was no material dispute as to the dog's abilities. The only issues submitted to the jury were whether Officer Stevens knew of the dog's limited abilities, and if so, whether he intentionally or with reckless disregard for the truth omitted to so state in his affidavit to the magistrate.[9] No other fact issues as to liability were submitted to the jury.

As to the other defendants, there were no fact issues. There was no legal basis upon which a rational trier of fact could find them liable, taking Plaintiffs' evidence presented as true.

b. Frivolity of Plaintiffs' Suit.

The facts of this case are stated in the Uncontroverted Facts, above.

Under these facts, Plaintiffs' theories of liability were: (1) that Officer Stevens did not have facts within his knowledge that would support a finding of probable cause; (2) that Superintendent Greenawalt, JISD, and Larry Lofton acted under color of state law and seized control of the Jennings vehicle while Stevens sought a search warrant; (3) that the search and seizure of the vehicle violated Plaintiffs' rights under the fourth and fourteenth amendments and state law.

The lawsuit is frivolous because, under Plaintiffs' evidence, there was no basis in law for Plaintiffs to argue that any defendant, besides Stevens, violated Plaintiffs' constitutional rights.[10]

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[9] The jury found that Officer Stevens did not know of the dog's limited abilities.

[10] In reaching this conclusion, the Court is aware of the Fifth Circuit's decision in Lewis v. City of Seagoville, No. 86-1835, (5th Cir. 1987). In Lewis, the Circuit vacated this Court's decision that plaintiffs' claims were frivolous and without foundation in fact. The Circuit stated: "After reviewing the record, we are convinced that this award was an abuse of the district court's discretion. We

2. Calculating Section 1988 Damages.

a. Mechanics.

Johnson is still effective law. Nisby v. Commissioners Court of Jefferson County, 798 F.2d 134, 136 (5th Cir. 1986). The twelve Johnson factors should be considered in the framework outlined in Copper Liquor, Inc. v. Adolph Coors, 684 F.2d 1087, 1092 (5th Cir. 1982): (1) ascertain the nature and extent of the services supplied by the attorney; (2) value the service according to the customary fee and quality of legal work; and (3) adjust the compensation on the basis of the other Johnson factors which may be of significance in the particular case. Nisby, 798 F.2d at 136.

The product of Copper Liquor steps (1) and (2) is the "lodestar." The district court must then consider the applicable remaining factors to determine if the lodestar should be adjusted. Nisby, 798 F.2d at 137.

The district judge must explain the findings and reasons upon which the award is based, including an indication of how each of the twelve factors in Johnson affected his decision. Nisby,

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previously reviewed plaintiffs' complaint and found that it stated a colorable claim under section 1983. The fact that plaintiffs lost their case is not in itself sufficient justification for the assessment of fees." Id. at 8-9.

This Court has difficulty in applying the Circuit's apparent holding that there is no distinction between (a) analyzing a complaint under Rule 12(b)(6) standards and (2) determining, after trial, that a case had no foundation in fact and is, therefore, frivolous. In analyzing a motion to dismiss brought under Rule 12(b)(6), a court should assume that all facts stated in a plaintiff's complaint are true. Ward v. Hudnell, 366 F.2d 247, 249 (5th Cir. 1966). After trial, however, either a plaintiff has offered proof of his allegations at trial or he has not.

In this case, there was no fact dispute relevant to any defendant except Officer Stevens. Since the defendants other than Stevens were entitled to judgment as a matter of law, the Court directed a verdict in their favor. It appears to this Court that there is a substantial difference between a plaintiff's inability, at trial, to produce evidence of a defendant's liability and a defendant's failure to produce evidence in a summary judgment motion.

798 F.2d at 137.

b. Assessment of Attorneys' Fees under Section 1988, Johnson, and Copper Liquor.

The first and second steps of the Copper Liquor framework, the "lodestar," are established above, in the Findings of Fact on Attorneys' Fees. All attorneys for those defendants entitled to recover attorneys' fees have adequately proved up their fees and itemized their labor. They have charged customary fees and performed their work reasonably well and obtained favorable results. Their work is properly valued by those customary fees. Therefore, the Court turns to the remaining step to see whether the fees should be adjusted. The Johnson factors[11] not already covered in the "lodestar" are considered in turn.

Factors 2, 3, 4, and 6, discussed in the Findings of Fact, do not affect the fees requested. As to factor 7 and SAI, this point strengthens SAI's claim to full reimbursement,[12] but the Court

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[11] The Johnson factors are:

1. Time and labor required;
2. Novelty and difficulty of the questions;
3. The skill requisite to perform the legal service properly;
4. The preclusion of other employment by the attorney due to acceptance of the case;
5. The customary fee;
6. Whether the fee is fixed or contingent;
7. Time limitations imposed by the client or circumstances;
8. The amount involved and the results obtained;
9. The experience, reputation, and ability of the attorneys;
10. The undesirability of the case;
11. The nature and length of the professional relationship with the client;
12. Awards in similar cases.

The Court sees that Copper Liquor step one restates Johnson factor one, that Copper Liquor step two restates Johnson factor five and entails Johnson factor eight. Therefore, the Court considers whether Johnson factors 2, 3, 4, 6, 7, 9, 10, 11, and 12 affect the "lodestar" and if so, how.

[12] SAI was both a third party defendant, having been impleaded by Francesca Reines and Royce Ingersoll, and a defendant named by Plaintiffs in their amended complaint.

will not increase SAI's recovery of attorneys' fees above those requested. As to the other Defendants, factor 7 has no effect. Factors 9, 10, 11, and 12 do not affect the fees requested.

3. Analysis of Case under Rule 11.

As this Court has concluded that this suit is frivolous and without basis in law or fact as to all defendants except Officer Stevens, the Court deems it appropriate to also consider the case in light of Rule 11.

In Southern Leasing Partners v. McMullan, 801 F.2d 783, 788 (5th Cir. 1986), the Court said: "[Plaintiffs] sued [defendant] without knowing how he fit into the picture, apparently hoping that later discovery would uncover something. If Rule 11 is to mean anything and we think it does, it must mean an end to such expeditionary pleadings." Id.

This Court finds that Plaintiffs, counseled by their attorney, sued Defendants knowing at the outset what the evidence, for the most part, would show. Plaintiffs and their attorney pursued discovery, which revealed little more than was originally known. Defendants had to defend by participation in discovery and trial. Surely, the outcome was foreseeable to Plaintiffs' attorney, if not entirely plain to Plaintiff William F. Jennings himself.[13] It is apparent from Plaintiff William Jennings' testimony that his only purpose in bringing the suit was to harass all the defendants. Plaintiff's attorney cooperated fully in this endeavor. Certainly, it is this type of practice by parties and their attorneys that Rule 11 was meant to eliminate. See Christiansburg, 434 U.S. at 421.

4. Imposition of Sanction.

As construed by Christiansburg, section 1988, applied to

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[13] Plaintiff William F. Jennings testified that his counsel agreed to represent him without any monetary compensation from the Plaintiff. He also testified that prior to hiring Gladden, he discussed his case with three different attorneys, but did not employ any of them.

prevailing defendants, has become a "mini-Rule 11" in civil rights cases. However, the indication is that section 1988 applies only to parties and does not impose any liability upon a party's attorney. Because of the reasons stated above, the Court considers it appropriate to make both Plaintiff William F. Jennings and his attorney, Don Gladden, jointly and severally liable to Defendants. Therefore, the Court has calculated attorneys' fees under section 1988, but does not order William F. Jennings to pay attorneys fees under that section.

Instead, the Court hereby SANCTIONS William F. Jennings and his attorney of record, Don Gladden, under Fed. R. Civ. P. 11 so that they are jointly and severally liable to the defendants as set out below. Plaintiff Naomi Jennings is not sanctioned, since she was a minor when the suit was originally filed.

Plaintiff William F. Jennings and his attorney of record, Don Gladden, are found jointly and severally liable to, and are hereby ORDERED to compensate, the following Defendants for their attorneys' fees in the indicated amounts:

1.	JISD Charles Greenawalt Larry Lofton	$ 49,114.45
2.	Francesca Reines Royce Ingersoll d/b/a The Institute of Criminal and Civil Investigations	$ 21,675.00
3.	SAI	$ 13,323.56

CONCLUSION

First, each Defendant except Officer Stevens hereby receives a directed verdict in his or her favor.

Second, Plaintiff William F. Jennings and his attorney of record, Don Gladden, are SANCTIONED under Fed. R. Civ. P. 11 and are ORDERED to pay defendants as delineated in this order.

So ORDERED this 5 day of January, 1988.

/s/ROBERT B. MALONEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. CA3-85-1700-T

WILLIAM F. JENNINGS and
NAOMI JENNINGS

v.

JOSHUA INDEPENDENT SCHOOL DISTRICT,
CHARLES GREENAWALT, Individually
and in his official capacity,
LARRY LOFTON, in his official capacity,
OFFICER DAVID STEVENS,
FRANCESCA REINES, and
ROYCE INGERSOLL, d/b/a THE INSTITUTE OF
CRIMINAL AND CIVIL INVESTIGATION

v.

SECURITY ASSOCIATES INTERNATIONAL

JUDGMENT

Pursuant to this Court's order directing a verdict for all Defendants except Officer Stevens and pursuant to a jury verdict which found Officer Stevens not liable to the Plaintiffs, the Court hereby renders Judgment that Plaintiffs take nothing.

The following Defendants are entitled to and are hereby granted judgment for their attorneys' fees against Plaintiff William F. Jennings and his attorney of record, Don Gladden in the indicated amounts:

1.	JISD Charles Greenawalt Larry Lofton	$ 49,114.45
2.	Francesca Reines Royce Ingersoll d/b/a The Institute of Criminal and Civil Investigations	$ 21,675.00
3.	SAI	$ 13,323.56

It is the judgment of this Court that Plaintiff William F. Jennings and his attorney of record, Don Gladden are jointly and severally liable to the Defendants as indicated above.

Interest shall accrue on these amounts at the rate of 7.22 per cent.

It is the judgment of this Court that Plaintiff William F. Jennings and his attorney of record, Don Gladden, are hereby SANCTIONED under Fed. R. Civ. P. 11.

So ORDERED this 5 day of January, 1988.

/s/ Robert B. Maloney
UNITED STATES DISTRICT JUDGE

No. 88-1089

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

William F. JENNINGS, Individually
and as Next Friend of Naomi
Jennings, a Minor, Plaintiff-Appellant,

and Don Gladden, Appellant,

v.

JOSHUA INDEPENDENT SCHOOL
DISTRICT, et al,
Defendants-Appellees,

Francesca Raines and Royce Ingersoll,
etc, Defendants-Third Party
Plaintiffs-Appellees,

Security Associates International,
Third Party Defendants-Appellees

Appeal from the United States
District Court for the
Northern District of Texas

(April 12, 1989,
5th Cir. 1989, 869 F.2d 870)

Before WISDOM, GARWOOD and JOLLY,
Circuit Judges

E. GRADY JOLLY, Circuit Judge:

This case is a civil rights action brought under 42 U.S.C. Section 1983, against school officials, a policeman, sniffer-dog handlers and other defendants. William Jennings, father of Naomi Jennings, alleged that the defendants violated his and his daughter's fourth amendment rights by conducting a search of his automobile in the Joshua High School parking lot pursuant to a search warrant. Jennings appeals from a judgment of the district court based on a directed verdict for all defendants except Officer David Stevens, who won before the jury. Both Jennings and his attorney Don Gladden, also appeal from that portion of the judgment imposing sanctions jointly and severally against each of them under Rule 11 of the Federal Rules of Civil Procedure. Because there was no basis in fact or law to hold any of the defendants, except the police officer, liable for violating the defendants' fourth amendment rights, and because the police officer was entitled to immunity, we affirm.

I

At the time the essential facts of this case occurred, the Joshua Independent School District maintained a program intended to educate students of the dangers of drugs, alcohol and weapons, and to deter students from bringing any of those items to school. Defendant Security Associates International (S.A.I.) contracted to provide the school with a sniffer-dog service to detect narcotics, marijuana, alcohol, firearms, ammunition and pyrotechnics on campus. Periodically, as a deterrent, the dogs would be walked through the school parking lot. If a dog was alerted by a scent from a car, the school's policy was to contact the student responsible for the vehicle. If the student refused to consent to a search of the car, school authorities would contact the student's parent. If the parent refused consent, then the authorities would contact law enforcement officials. The hope was that these inspections would discourage students from bringing to school substances and objects banned under school policy.

On March 29, 1985, a trained sniffer dog named King was alerted by an unattended car in the Joshua High School parking

lot. William Jennings' daughter Naomi had driven the car to school that day. Naomi Jennings was called out of school and asked to consent to a search of the vehicle. She refused because her father, who had various jobs as a federal law enforcement official investigating embezzlement and fraud in the United States postal system, had instructed her to refuse consent and call him if a dog ever was alerted by the car. William Jennings had learned of the school sniffer-dog program in January of 1985 when Naomi described it to him, and Jennings had then expressed his disapproval of the program on fourth amendment grounds.

Jennings was notified that a sniffer dog had reacted to his car, and he drove to the Joshua High School parking lot, where he met his daughter, his wife, the dog handler, the principal and the vice principal of the high school. After he also refused consent, the school officials contacted the police, and police officer Stevens arrived. Jennings was informed that the situation was going to be a police matter, and Officer Stevens proceeded to conduct an independent investigation. He asked defendant Francesca Raines, the dog handler, for information on the dog's reliability and training, and was given a demonstration of how the dog worked. He was also shown reports of what had been found in other cars that had alerted the dog that day. Stevens telephoned the county attorney for advice on whether there was sufficient probable cause to justify seeking a search warrant and then drove Raines to the county attorney's office, in case the county attorney wished to ask her any questions. Jennings, who was present at the scene throughout the investigation, then waited in the school parking lot with the vice principal of the high school for Officer Stevens to return.

The county attorney, after consulting with Raines and Stevens, concluded that there was sufficient evidence to apply for a search warrant, and directed the preparation of an affidavit. The county judge determined that probable cause existed and issued a search warrant. Officer Stevens and Raines returned to the school parking lot where Stevens executed the search warrant in front of Jennings. That search revealed no object or substance prohibited by law or school policy.

On August 29, 1985, Jennings brought this civil rights suit under 42 U.S.C. Section 1983 on behalf of himself and his minor daughter, Naomi, against Joshua Independent School District ("J.I.S.D."), Greenawalt (Superintendent of Schools), Loftin, (vice principal of the high school), Officer Stevens (employed by the City of Joshua), the City of Joshua itself, and Francesca Raines and Royce Ingersoll, d/b/a The Institute of Criminal and Civil Investigations (the dog handlers). S.A.I., who provided the sniffer-dog service to the high school, was later added as a defendant, and Jennings later withdrew his claim against the city as a defendant.

On November 7, 1986 the district court denied the motions for summary judgment of three school defendants and the dog handlers because no evidence had been submitted relating to the dog's reliability. On January 28, 1987 the district court denied S.A.I.'s and Stevens' motions for summary judgment.

A five-day trial began on October 5, 1987. At the close of the plaintiffs' case the court directed a verdict in favor of the school defendants, Ingersoll and Raines, and S.A.I. The jury returned a verdict for Stevens.

On January 5, 1988, the district court entered judgment finding Stevens not liable pursuant to the jury's verdict, directing a verdict for all the remaining defendants, awarding attorneys' fees to all defendants except Stevens, and imposing sanctions against Jennings and his attorney pursuant to Rule 11. Jennings filed a timely notice of appeal.

II

A.

Jennings' first claim on appeal is that the district court erred in failing to rule that no probable cause existed for the search of his car, or, alternatively, erred in failing to submit that issue to the jury.

As to defendants Ingersoll, Raines, J.I.S.D., Greenawalt, Loftin and S.A.I., there was no need for the district judge to make

a determination of the existence or nonexistence of probable cause. Whether probable cause in fact existed is irrelevant to the directed verdict granted in their favor. The use of trained dogs to sniff automobiles parked on public parking lots does not constitute a search within the meaning of the fourth amendment. Horton v. Goose Creek Independent School District, 690 F.2d 470, 477 (5th Cir. 1982), cert. denied, 463 U.S. 1207, 103 S.Ct. 3536, 77 L.Ed.2d 1987 (1983). Once William Jennings declined to allow a search of his car, these defendants withdrew, except as witnesses, and turned the matter completely over to law enforcement officials. They therefore cannot be liable for any constitutional violation that followed.

To be liable under section 1983 a defendant must have been personally implicated in the wilful act causing the deprivation of a constitutional right, or must have had or been chargeable with knowledge that his subordinates were causing a constitutional deprivation. Love v. King, 784 F.2d 708, 711 (5th Cir. 1986). Though the school officials contacted the police, their actions cannot be said to have been the legal cause of any subsequent deprivation of the Jennings' fourth amendment rights. Officer Stevens made an independent investigation when he reached the school parking lot; the county attorney, after review, authorized the application for the warrant; and the judge then made his own independent determination of probable cause based on the information Officer Stevens had gathered and on the affidavit drawn up by the county attorney. Nor may dog handler Raines or any of the other defendants be said to have been personally implicated in or jointly responsible for Stevens' actions merely because he or she furnished information to Stevens in the course of his investigation, see Hernandez v. Schwegmann Bros. Giant Supermarkets, Inc., 673 F.2d 771, 772 (5th Cir. 1982); White v. Scrivner Corp., 594 F.2d 140, 143-44 (5th Cir. 1979). Further, Officer Stevens was not a "subordinate" of any of the named defendants, because none had any duty or authority to control his actions, and none of the defendants had any knowledge that Officer Stevens might act unlawfully in pursuing and executing a search warrant on the Jennings' car.

As the record makes plain, none of these defendants acted

outside the scope of his or her authority in conducting, directing or allowing the sniff search of the Jennings' car, or acted jointly with the police to cause the deprivation of the Jennings' constitutional rights. Even if the district court had submitted the issue of probable cause to the jury with respect to these defendants, and the jury had found probable cause lacking, the finding would not support a judgment against these defendants.

B.

As to defendant Stevens, it was also unnecessary for the district court, or the jury to decide whether probable cause for the issuance of the search warrant existed, since his liability turns on immunity, not on a determination of actual probable cause.[1]

In Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d

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[1] The only interrogatories submitted to the jury were the following:

QUESTION NUMBER 1
The burden of proof is on the plaintiffs.

Do you find from a preponderance of the evidence that defendant Stevens had knowledge, or had reason to believe, at the time of making his affidavit, that material facts existed with regard to limitations on the capabilities of the dog which he omitted from the search warrant affidavit?

Answer "we do" or "we do not."

[ANSWER: We do not.]

QUESTION NUMBER 2
Answer this question only if you answered question Number 1 "we do."

The burden of proof is on the plaintiffs.

Do you find from a preponderance of the evidence that defendant Stevens intentionally, or with reckless disregard for the truth, omitted the material facts from the affidavit?

Answer "we do" or "we do not."

[ANSWER: _____]

271 (1986), the Supreme Court reviewed a civil rights action brought under section 1983 against a police officer, alleging that the plaintiffs had been arrested on warrants, secured by the officer, that were unsupported by probable cause. The Court announced the following test for the defense of qualified immunity for police officers in this context: "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue, but if officers of reasonable competence could disagree on this issue, immunity should be recognized." 475 U.S. at 341, 106 S.Ct. at 1096. The question to be asked, under Malley, is "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for a warrant." Id. 106 S.Ct. at 1098.

It is true, as Jennings argues, that, although King, the dog, was trained to detect various contraband, he also was capable of reacting to some nonprescription drugs and to residual scents lingering for up to four to six weeks. While the district court assumed that Stevens' good faith would exonerate him from liability under the doctrine of qualified immunity, we examine the case under Malley and review Stevens' conduct to determine whether it should have been obvious that a reasonably competent

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Although the record is unclear on what authority the district court relied for these questions to determine immunity, it is apparent that the jury was in effect asked to decide factual disputes that would resolve whether Stevens had acted in good faith. The jury found that he had.

Gladden and Jennings objected to question one on the grounds that it did not constitute the ultimate issue to be decided by the jury, which should have been whether or not probable cause existed. Gladden also objected to the fact that question two was conditioned upon an affirmative answer to question one, and made a Malley objection to the damages interrogatories, which were also conditioned on an affirmative answer to question one.

Stevens objected to the charge as a whole on the grounds that it failed to instruct the jury that reasonable good faith is a defense under Reimer v. Short, 578 F.2d 621 (5th Cir. 1978). Reimer was of pre-Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), pre-Malley case. Stevens further objected to the use of the term "material fact" in the charge.

officer would have concluded on the basis of the garnered information that probable cause existed.

In this case there were enough undisputed facts for the court to have made a legal determination that Stevens was entitled to immunity.[2] We certainly cannot say that it was obvious that an application for a warrant should not have been made in this case. Officer Stevens' affidavit stated that past experience had proved King to be reliable in the detection of "pyrotechnics, alcoholic beverages, dangerous drugs and controlled substances (including marijuana)." It further stated that "[o]n March 29, 1985 the dog alerted his handler that 10 specific automobiles had some or one or more of" these substances. Seven of these cars were searched with the consent of their owners, and "one of the following pyrotechnics, alcoholic beverages, dangerous drugs or controlled substances (including marijuana) was located in [each] automobile." The record shows that of the eight cars actually searched that day, the following was found in each respectively: a 25 caliber pistol, loaded; sixteen 12 gauge shells, beer caps; nine empty beer bottles and four empty beer cans; two 12 gauge shells, two empty beer cans; asthma medication; five empty beer cans and a Primatene inhaler, a cap pistol and caps containing gun powder; the scent of previously vomited beer.

Section 46.04(a) of the Texas Penal Code prohibits the knowing or reckless possession of firearms or explosive weapons on school property. The Texas Education Code, section 4.22, prohibits the possession of any intoxicating beverage for consumption, sale or distribution, on school grounds. Although there is some question as to whether beer residue inside empty beer cans would be in violation of the Texas Education Code, "only where the warrant application is so lacking in probable cause as to render official belief in its existence unreasonable ... will the shield of immunity be lost." Malley, 475 U.S. at 341, 106 S.Ct. at 1098; Taylor v. City of Nederland, Texas, 685 F.Supp. 616, 618 (E.D.Tex.

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[2] Since the Malley test is objective rather than subjective, and since the record below developed sufficient undisputed facts, the issue of Stevens' immunity under Malley is one for the court to decide as a matter of law.

1988). Although we do not decide whether probable cause existed in this case, we can say that Officer Stevens' belief in the existence of probable cause was not objectively unreasonable given the proven reliability of the dog on the day in question in detecting the presence of trace amounts of alcoholic beverages, pyrotechnics and controlled substances in vehicles on the school parking lot. When a factual situation presents a close question on probable cause, the benefit of the doubt belongs to the police officer who submits the close question for a magistrate's decision.

Finally, we observe that although Malley does not indicate that the cautionary and reasonable conduct of the officer factors into the objective standard, we do think that Stevens, by any objective standard, acted reasonably when he sought the advice of the county attorney as well as the advice of his superiors in the police department before applying for the warrant.

III

Jennings' second assertion of error is that the district court wrongly held that the charged conduct of the school defendants, the dog handlers, and S.A.I. was not attributable to the state for section 1983 purposes.[3] Section 1983 provides that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any Sate or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable....

For reasons previously discussed, it is clear that none of these parties took action under color of state law to deprive Jennings or his daughter of any constitutional right.

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[3] Although it would appear unnecessary to address the issue of state action since we have previously concluded that these defendants bore no ultimate responsibility for the issuance of the warrant, this issue is relevant to our later determination of the propriety of Rule 11 sanctions in this case.

When the Jennings refused to consent to a search of their car, the school defendants turned the matter completely over to Officer Stevens who conducted his own independent investigation. The search that followed was not the result of state action on the part of the school defendants because none of the defendants was responsible for Officer Stevens' decision to seek a warrant, or for the manner in which he prepared his affidavit. There is no evidence on the record to indicate that the school authorities acted jointly or in concert with Officer Stevens to deprive the Jennings' of constitutional rights, or that a custom or preconceived plan existed between the police and the school district to conduct automobile searches on less than probable cause where the police were involved. Further, the school defendants and dog handlers had no reason to believe that Officer Stevens would not act lawfully once they withdrew and put the matter in his hands.

Although Raines, Ingersoll and S.A.I. contracted with J.I.S.D. to provide and handle sniffer dogs to assist the school authorities in controlling illicit drugs, which might suggest that those parties under certain circumstances could have been state actors, based on the facts here, that contract cannot serve as the basis for a section 1983 cause of action against them; because the use of a trained dog to sniff a parked car does not constitute a search under the fourth amendment, their execution of that contract deprived the Jennings of no constitutional rights. See Horton, 690 F.2d at 477.

Furthermore, Raines was not acting under color of state law when she later simply communicated to Officer Stevens what had transpired in the school parking lot, and described and demonstrated King's capabilities. After the dog was alerted, she played no further part in the investigation except as called upon by the police as a witness. Indeed, she operated under instructions that she was not voluntarily to involve herself in any police investigation that might result after a sniffer dog was alerted. For all practical purposes, Raines' obligations under the contract with the school ended once she had walked King through the school parking lot, noted the automobiles to which the dog reacted, conducted searches of those vehicles when the owners' consent could be obtained, and recorded any substances found. Raines

did not contact the police, and when the police arrived, only responded to Stevens' questions; the furnishing of information by a private party to a police officer who then acts on his own initiative is not action taken under color of state law. Sims v. Jefferson Downs Racing Ass'n, Inc., 778 F.2d 1068, 1078-79 (5th Cir. 1985); Hernandez v. Schwegmann at 772; White v. Scrivner Corp., 594 F.2d at 143.

IV

Jennings' and his attorney's third contention on appeal is that the district court abused its discretion in holding Jennings and Gladden jointly and severally liable to the defendants, with the exception of Officer Stevens, for attorneys' fees. The district court imposed fees under the authority of both section 1988 and Rule 11, and the amount was determined by the formula generally applied under section 1988.

Section 1988 provides that prevailing defendants may recover attorneys' fees only upon a finding that the plaintiff's claim is frivolous, unreasonable, groundless, made in bad faith, or persisted in after it becomes apparent that any of the above is the case. 42 U.S.C. section 1988. The district court found Jennings' case to be frivolous and without merit as to all defendants except Stevens, in spite of the court's acknowledgment that it had denied the motions of these defendants for summary judgment and conducted a five-day jury trial on the merits.[4] The court noted in the sanctions order now on appeal that it had denied these motions because the parties had failed to submit any evidence as to whether the dog had any ability to detect contraband. Lacking such evidence, the court did not grant them summary judgment.

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[4] Ingersoll and Raines filed a motion for summary judgment on March 24, 1986, and J.I.S.D., Greenawalt and Loftin filed the same motion on June 16, 1986. Both motions were denied on November 7, 1986. S.A.I.'s motion for summary judgment was filed on December 18, 1986, and denied on January 28, 1987.

Officer Stevens filed a motion for summary judgment on December 19, 1986 on grounds of absolute and qualified immunity, which the district court denied on January 28, 1987, stating that Stevens had no defense of absolute immunity, and

The only issues submitted to the jury at the trial concerned Officer Stevens: whether Stevens had knowledge or reason to believe at the time of making his affidavit that there existed material facts regarding the dog's limited capabilities that he omitted from the affidavit, and, if he had such knowledge, whether he intentionally or with reckless disregard omitted those material facts.[5]

The district court held Jennings liable for attorney's fees under section 1988, and then imposes [sic] those sanctions jointly and severally upon Jennings and his attorney under Rule 11. We will not address whether attorney's fees were awardable under section 1988; we address only whether they were awardable under Rule 11.

Rule 11 requires that every paper signed and filed during the course of proceedings be, to the best of the signer's knowledge, information and belief formed after reasonable inquiry, well grounded in fact, warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and not imposed for any improper purpose, such as to harass or to cause unnecessary delay or increase the cost of litigation. Fed.R.Civ.P. 11. Under the Thomas "snapshot" rule, a district court should not take the benefit of hindsight. It should look only at what the attorney objectively knew at the time the paper was signed and ask whether, at the time it was signed, the paper violated the Rule 11 standard of good faith and reasonable investigation. Thomas v. Capital Security Services, Inc., 836 F.2d 866 (5th Cir. 1988) (en banc).

In the case before us, the district court calculated and imposed as sanctions the reasonable attorneys' fees incurred by all parties, except Officer Stevens, during the pendency of the case. Thus our Rule 11 snapshot is taken at the time the complaint

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subjective good faith for qualified immunity purposes is always a question of fact.

[5] As we have noted earlier, subjective good faith is not at issue in a determination of whether Stevens enjoyed immunity. Rather the question under Malley is whether, on an objective basis, it should have been obvious to Stevens that no reasonably competent officer would have concluded from the information Stevens had gathered that a warrant should issue.

was filed. The court found that:

> Plaintiffs, counseled by their attorney, sued Defendants knowing at the outset what the evidence, for the most part, would show. Plaintiffs and their attorney pursued discovery, which revealed little more than was originally known. Defendants had to defend by participation in discovery and trial. Surely, the outcome was foreseeable to Plaintiffs' attorney, if not entirely plain to Plaintiff William Jennings himself. It is apparent from Plaintiff William Jennings' testimony that his only purpose in bringing suit was to harass all the defendants. Plaintiffs' attorney cooperated fully in this endeavor. Certainly, it is this type of practice by parties and their attorneys that Rule 11 was meant to eliminate.

The filing of a complaint that complies with the "well grounded in fact and warranted by existing law" prong of Rule 11 cannot, as a matter of law, harass the defendant as Rule 11 forbids, regardless of the plaintiff's subjective intent, or so we have held. National Ass'n of Government Employees v. National Federation of Federal Employees, 844 F.2d 216, 223-24 (5th Cir. 1988). If Jennings' original complaint passes the test of nonfrivolousness, its filing does not constitute harassment for Rule 11 purposes. Id. Therefore, we consider whether the district court abused its discretion in finding that a Rule 11 violation occurred at the time Jennings' complaint was filed, and whether the court abused its discretion in imposing the sanctions it chose to impose. See Thomas at 872.

Jennings was fully aware of all the pertinent facts relating to this lawsuit on the day the search of his vehicle occurred. He understood the school's program, he was present at the school parking lot at all the relevant times, he observed communications between the parties, he knew that Stevens left the scene with Raines, the dog handler, to obtain a search warrant, and he knew that a judge had issued the warrant on the basis of the sniffer dog's alert. No pre-complaint investigation was conducted. Discovery brought forth no new evidence nor was there any basis for expecting it to do so. Because the facts were known and virtually

uncontested, the question here for Rule 11 purposes must be whether Jennings' legal theories--first, that his fourth amendment rights had been violated by the search, and second that the school defendants, dog handlers and owners had acted under color of state law to deprive him of his rights under the fourth and fourteenth amendments and state law--could fairly be said to have been unreasonable from the point of view both of existing law and its possible extension, modification or reversal. See Smith International, Inc. v. Texas Commerce Bank, 844 F.2d 1193, 1200 (5th Cir. 1988).

William Jennings had voiced his strong disapproval of the J.I.S.D. sniffer-dog search program to his family prior to the events at issue in this case. He told his daughter not to cooperate if a dog ever reacted to his car. After Jennings arrived at the school parking lot on March 29, 1985, he threatened to sue everyone on the premises, and then did bring this lawsuit against everyone related in any way to the incident. He did this in spite of the fact that, as he testified at trial, he did not think that his or his daughter's constitutional rights had been violated by any of the discrete actions of the school officials or dog handler Raines prior to the time Officer Stevens left to obtain a search warrant. We further observe that Don Gladden agreed to represent William Jennings without compensation, and that the American Civil Liberties Union, Gladden's employer, was concerned with whether sniffer-dog searches, in the absence of prior particularized suspicion, provide school authorities with reasonable cause, or police officers with probable cause, to search vehicles on school property. This matter, however, had been addressed in Horton, and no Supreme Court or later authority has been cited to suggest that Horton's principles of law might be overturned.

Gladden argues that he named the particular defendants because he believed that all acted at some point pursuant to government contract, and believed that the causal relationship here between the sniff search and the execution of the search warrant was such that those defendants should not be insulated from section 1983 liability. Gladden contends that if the facts revealed the school defendants, dog handlers and owners had acted in concert with Stevens to deprive the Jennings of their

constitutional rights, those defendants should share liability with Officer Stevens for such deprivation. But Jennings and Gladden conducted no pre-complaint investigation at all to determine whether there was any basis for a theory of collusive conduct between the police and the other defendants. At the time of the filing of the complaint, there was no evidence or even suggestion that this connivance existed. Discovery added nothing at all; it showed that the J.I.S.D. policy in fact states that if a parent refuses consent, the matter is one for the police from that point forward. The S.A.I. policies and procedures handbook similarly states that "if the district decides to notify the police in completing the search, the matter is in their hands," and S.A.I. people are not to get involved, unless specifically requested to do so by the police.

All parties concerned acted within the scope of their respective authorities and facts supporting this conclusion were essentially known to Jennings and Gladden at the time the complaint was filed. Officer Stevens conducted an independent investigation of the facts when he arrived on the scene; the school defendants withdrew after Jennings refused to consent to the search of his car, and Officer Stevens, upon advice of the county attorney, obtained an authorized search warrant ultimately used to effectuate the search. There was simply no basis for suspicion that the school was in collusion with the police. Because it should have been clear at the outset to Jennings and his attorney that even if the county judge had issued the warrant on insufficient probable cause, the facts could not have supported claims against any of the named defendants except Officer Stevens, the district court did not abuse its discretion in imposing Rule 11 sanctions jointly and severally upon Jennings and his attorney, Don Gladden, for their claims against the school defendants, dog handlers and dog owners. See Smith International, 844 F.2d at 1201; Robinson v. National Cash Register Co., 808 F.2d 1119, 1125, 1131 (5th Cir. 1987); Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 789 (5th Cir. 1986).

Nor is there any abuse of discretion in the district court's decision not to discount sanctions because the court allowed this case to go to trial. As we stated in Thomas, "a determination of whether or not a pleading is well grounded in law and fact may not

be feasible until after an evidentiary hearing on a motion for summary judgment or even after the parties have presented their case at trial." 836 F.2d at 881. The district court adequately explained to the parties why it denied their motions for summary judgment, and granted the motions of all defendants except Officer Stevens for a directed verdict at its earliest opportunity, the close of the plaintiff's evidence. It was not an abuse of discretion for the district court to find that all litigation costs in this proceeding, incurred by all defendants except Stevens, resulted directly from Jennings' filing of an original complaint deficient under Rule 11.

In sum, we believe after review of the record, that the district court did not abuse its discretion in finding that this case was not well grounded in fact or law from its inception against all defendants except Officer Stevens, and in imposing Rule 11 sanctions against Jennings and his attorney accordingly. All of the material facts were known to Jennings and Gladden at the time they filed their complaint, and a reasonable inquiry into the law would have demonstrated that the complaint against the school authorities and the dog handlers was not warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law. Not only was there no basis to suspect collusion between the school authorities and the police, but Jennings and Gladden made no reasonable inquiry to determine whether there were even minimal facts suggesting that the school authorities and police had colluded to deprive the plaintiffs of their constitutional rights.

Although this is a close case with respect to sanctions, and if we had been sitting as district judges we might have arrived at a different conclusion, given these circumstances we cannot say that it was an abuse of discretion for the district court to conclude that the complaint in this case was filed in violation of Rule 11.

V

For the foregoing reasons, the judgment of the district court is in all respects
AFFIRMED.

No. 88-1089

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

William F. JENNINGS, Individually
and as Next Friend of Naomi
Jennings, a Minor, Plaintiff-Appellant,

and Don Gladden, Appellant,

V.

JOSHUA INDEPENDENT SCHOOL
DISTRICT, et al,
Defendants-Appellees,

Francesca Raines and Royce Ingersoll,
etc, Defendants Third Party
Plaintiffs-Appellees,

Security Associates International,
Third-Party Defendants-Appellees

Appeal from the United States
District Court for the
Northern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
([Prior] Opinion April 12, 1989,
5th Cir. 1989, 869 F.2d 870)

(June 19, 1989)

Before WISDOM, GARWOOD and JOLLY,
Circuit Judges

E. GRADY JOLLY, Circuit Judge:

The appellants' petition for rehearing is granted.

Upon further consideration and in the interest of allowing for the smooth evolution of Rule 11 jurisprudence, we substitute for the last three full paragraphs of section IV and section V of our opinion in Jennings v. Joshua Independent School District, 869 F.2d 870 (5th Cir. 1989), the following:

However, because this case was tried by the district court prior to the issuance of this circuit's en banc decision in Thomas [v. Capital Sec. Services, Inc., 836 F.2d 866 (5th Cir. 1988)], we vacate and remand that section of the district court opinion imposing sanctions in the amount of $84,000, for reconsideration in the light of Thomas. Given the amount of the sanction, we ask that the district court address Thomas's mitigation and notice requirements, as well as Thomas's command that the sanctions imposed be the least severe sanctions adequate under the circumstances to promote Rule 11's purposes of education, compensation and deterrence. We do this in keeping with Thomas's statement that "[i]f the sanctions imposed are substantial in amount, type or effect, appellate review of such awards will be more rigorous," 836 F.2d at 883. We wish to make certain that the district court's justification for the Rule 11 decision in the record corresponds to the amount, type and effect of the sanction imposed, before reviewing that record and decision for abuse of discretion. See Thomas, 836 F.2d at 883.

V

For the foregoing reasons, the judgment of the district court is

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

In all other respects, the petition for rehearing in this case is DENIED. No member of the panel nor judge in regular active service of this court having requested that the court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

NO. CA3-85-1700-T

WILLIAM F. JENNINGS and
NAOMI JENNINGS,
Plaintiffs,

V.

JOSHUA INDEPENDENT SCHOOL DISTRICT,
et al.,
Defendants,

V.

SECURITY ASSOCIATES INTERNATIONAL,
Third-Party Defendant.

ORDER CONCERNING ATTORNEYS' FEES AFTER REMAND

This Section 1983 action was tried before a jury on October 5-13, 1987. During the trial, the Court directed a verdict for all defendants except David Stevens. On November 24, 1987, the Court held a hearing for Plaintiffs and their counsel, Dan [sic] Gladden, to show cause why they should not pay Defendants' attorneys' fees pursuant to 42 U.S.C. Section 1988 and Rule 11, Fed. R. Civ. P. On January 5, 1988, the Court entered its order finding that Plaintiffs' complaint was frivolous and without basis in law or fact with respect to all defendants except Stevens. The Court, therefore, sanctioned Plaintiff William Jennings and his counsel, Dan [sic] Gladden, jointly and severally, pursuant to Rule 11 for the attorneys' fees of all defendants, except Stevens.

On February 2, 1988, Jennings and Gladden filed their

notice of appeal. On April 12, 1989, the United States Court of Appeals for the Fifth Circuit entered its decision affirming the Court's judgment in this action. See Jennings v. Joshua Independent School District, 869 F.2d 870 (5th Cir. 1989). However, on June 19, 1989, the Fifth Circuit, on a petition for rehearing, vacated in part and remanded that portion of the Court's judgment finding Rule 11 sanctions against Jennings and Gladden. Specifically, the Fifth Circuit directed the Court to reconsider its opinion imposing sanctions in light of Thomas v. Capital Security Services, Inc., 836 F.2d 866 (5th Cir. 1988) (en banc), which was decided after the Court entered its Rule 11 sanctions. The Fifth Circuit directed the Court to "address Thomas's mitigation and notice requirements, as well as Thomas's command that the sanctions imposed be the least severe sanctions adequate under the circumstances to promote Rule 11's purpose of education, compensation and deterrence." See 877 F.2d 313 (5th Cir. 1989).[1]

In Thomas, the Fifth Circuit held that once a Rule 11 violation has been determined to have occurred, imposition of sanctions is mandatory; and that the district court has a variety of options available when imposing sanctions. However, the Fifth Circuit held that whatever sanction is made must be the least severe sanction adequate to serve the purpose of Rule 11. Thomas, 836 F.2d at 878. Rule 11 specifically permits the Court to order a party who violated Rule 11 to pay his opponent, "the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." Fed. R. Civ. P. 11; Thomas, at 878. The reasonableness finding necessarily embraces an inquiry by the court as to the extent to which the nonviolating party's expenses and fees could have been avoided or were self-imposed. Id. at 879. Therefore, the nonviolating party has a duty of mitigation; a duty to use reasonable means to terminate the litigation and to prevent the

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[1] After the entry of the Fifth Circuit's opinion on the petition for rehearing, Jennings and Gladden filed a writ of certiorari to the Supreme Court of the United States. The Supreme Court denied certiorari on June 18, 1990. See ___ U.S. ___, 110 S. Ct. 3212, 110 L. Ed.2d 668 (1990). The Court had been awaiting the Supreme's Court's decision on the writ of certiorari prior to reconsidering its Rule 11 sanctions under Thomas.

costs of a frivolous suit from becoming excessive. Id. at 880. In that vein, an attorney may not remain idle after a pleading is filed in violation of Rule 11. The advisory committee notes stress that a party seeking sanctions should give notice to the court and the offending party promptly. Prompt notice of Rule 11 violations conserves judicial time and energy, as well as monetary resources, while at the same time deterring future violations. Id. at 879.

In the instant action, the Court previously found that this action was frivolous and was without basis in law or fact. The Court noted that all the pertinent facts were known to Jennings and his counsel prior to the action being filed. With respect to whether Defendants sought to mitigate their costs, the Court finds that Defendants did attempt to mitigate their costs by filing motions for summary judgment. As the Court clearly stated in its January 5, 1988 order, when the Court denied Defendants' motions for summary judgment the Court expected that Defendants would refile their motions; however, the Court realized that it could have expressed its thoughts about the motions for summary judgment more clearly so that Defendants would have more readily understood the Court's concern about the motions and that the Court intended for Defendants to file renewed motions for summary judgment. Consequently, the Court finds that Defendants attempted to mitigate their expenses by seeking to terminate Plaintiffs' claims prior to trial by way of motions for summary judgment, but that any fault for not refiling motions for summary judgment which might have dismissed Defendants without the need of trial lay with the Court. The record is, however, devoid of any evidence that Defendants attempted to promptly notify Plaintiffs that their claims were frivolous and that Plaintiffs might be subject to Rule 11 sanctions.

Therefore, the Court having considered this action in light of the Fifth Circuit's mandate that this Court consider its Rule 11 sanctions in light of Thomas's mitigation and notice requirements, is of the opinion that Defendants did attempt to mitigate their expenses by moving the Court for summary judgment, but that Defendants failed to promptly notify Plaintiffs that their pleadings may have been in filed in violation of Rule 11. Nonetheless, the Court finds that under the facts of this case sanctions are

appropriate.

The Court is of the opinion that payment of one-half of the Defendants attorneys' fees is an appropriate sanction. The Court finds that reduction of each award by one-half is appropriate because Defendants failed to provide prompt notice to the Court or Plaintiffs that they believed that the pleadings were filed in violation of Rule 11. Litigants should not remain idle in the face of possible violations. Thomas, 836 F.2d at 881. However, the Court is convinced from the facts of this case that an award of one-half of Defendants' attorneys' fees is the least severe sanction adequate to serve the purpose of Rule 11. As the Court found in its January 5, 1988 order, Plaintiffs knew all the pertinent facts prior to filing this action and the outcome of the trial was surely foreseeable to Jennings and his counsel. The fact that sanctions were not imposed until after trial in this action is of no comfort to Jennings and his counsel because a determination of whether a pleading is well grounded in law and fact may not be feasible until after the parties have presented their case at trial. Id.

It is therefore ORDERED that Plaintiff William F. Jennings and his attorney of record, Don Gladden, are jointly and severally liable to the following Defendants for their attorneys' fees in the amounts indicated:

1.	Joshua Independent School District Charles Greenawalt Larry Lofton	$24,557.23
2.	Francesca Reines Royce Ingersoll d/b/a The Institute of Criminal and Civil Investigation	$10,837.50
3.	SAI	$ 6,661.78

Signed this 18th day of October 1990.

/s/ROBERT B. MALONEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILLIAM F. JENNINGS and
NAOMI JENNINGS
Plaintiffs,

v. CA 3-85-1700-T

JOSHUA INDEPENDENT SCHOOL
DISTRICT,
et al.,
Defendants,

v.

SECURITY ASSOCIATES
INTERNATIONAL
Third-party Defendant.

ORDER DENYING MOTION TO ALTER OR AMEND

On October 18, 1990, the Court entered its Order Concerning Attorneys' Fees After Remand. On October 26, 1990, Plaintiff filed his Motion to Alter or Amend Judgment Imposing Compensatory Rule 11 Sanctions.

Having considered the motion to alter or amend, the Court is of the opinion that the motion should be denied.

It is therefore ORDERED that Plaintiff's motion to alter or amend judgment imposing compensatory Rule 11 sanctions is denied.

Signed this 26 day of October 1990.

/s/ Robert B. Maloney
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1089

WILLIAM F. JENNINGS, Individually
and as Next Friend of Naomi Jennings,
a Minor,
Plaintiff-Appellant,

and Don Gladden,
Appellant,

versus

JOSHUA INDEPENDENT SCHOOL DISTRICT,
et al.,
Defendants-Appellees,

Francesca Raines and
Royce Ingersoll, Etc.,
Defendants Third-Party
Plaintiffs-Appellees,

Security Associates International,
Third-Party Defendants-Appellees,

Appeal from the United States
District Court for the
Northern District of Texas

(Filed August 22, 1990)

Before WISDOM, GARWOOD and JOLLY,
Circuit Judges.

BY THE COURT:

Before us is appellants' motion to recall the mandate in Jennings v. Joshua Independent School Dist., 869 F.2d 870 (5th Cir. 1989), on reh'g aff'd in part, vacated in part and remanded, 877 F.2d 313, cert. denied, ___ U.S. ___, 110 L.Ed.2d 660, 58 USLW 3800 (1990). Under Local Rule 41.2, "[a] mandate once issued shall not be recalled except to prevent injustice." The appellant argues that Hale v. Fish, 899 F.2d 390 (5th Cir. 1990), rendered a year after our panel opinion, conflicts with our reasoning and thus demands recall of the mandate to prevent injustice.

In Jennings, we held that there was no basis for Section 1983 liability on the part of school officials, because actions by an intervening actor (a policeman) broke any causal chain between their acts and the ultimate issuance of the allegedly unconstitutional search warrant. Concluding that there was no basis in fact or law for liability by school officials, we affirmed a directed verdict in their favor and the award of sanctions under Fed.R.Civ.Pro. 11. 869 F.2d at 874-75. On rehearing, we vacated our affirmance of the imposition of sanctions, totalling $84,000 in attorney's fees, and remanded for reconsideration in the light of Thomas v. Capital Security Services, Inc., 836 F.2d 866 (5th Cir. 1988) (en banc), which had not been released when the district court imposed sanctions. 877 F.2d at 321-22. In all other respects, our panel opinion was unchanged.

The appellants contend that Hale v. Fish, id., conflicts with our panel opinion, because it held that actions by an assistant district attorney did not break a causal chain of Section 1983 liability. Hale, in which kidnapping arrestees sued the police officers and FBI agents who obtained their allegedly unconstitutional arrest warrants, is distinguishable on its facts. In Hale, "material facts" concerning the basis for the warrants were never presented to the assistant district attorney, preventing him from being an "impartial intermediary" who could break the causal chain. 899 F.2d at 401. Here, by contrast, the intermediary in question, a policeman, independently and thoroughly investigated the factual basis for the search before obtaining the allegedly unconstitutional warrant. Moreover, even if there were any conflict between our panel opinion and the decision in Hale,

rendered over a year later, the prior opinion controls. Ryals v. Estelle, 661 F.2d 904, 906 (5th Cir. 1981); Alcorn County, Miss. v. U.S. Interstate Supplies, 731 F.2d 1160, 1166 (5th Cir. 1984). Finally, having twice determined that there was no legal or factual basis to appellants' claims against the school officials, the only arguable "injustice" was the imposition of sanctions, which we have already remanded for reconsideration.

For the foregoing reasons, appellants' motion to recall the mandate is hereby DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-7004

William F. JENNINGS,
Plaintiff-Appellant,

and

Don Gladden, Appellant,

versus

JOSHUA INDEPENDENT SCHOOL DISTRICT, et al., Defendants-Appellees,

Francesca Raines and Royce Ingersoll, etc., Defendants-Third Party Plaintiffs-Appellees,

Security Associates International, Third Party Defendants-Appellees.

Appeal from the United States
District Court for the
Northern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 12/10/91, 5 Cir., 1991,
[948] F.2d [194])
(January 9, 1992)

Before CLARK, Chief Judge, WILLIAMS, and BARKSDALE, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Charles Clark
Chief Judge

Supreme Court, U.S.
FILED
MAY 6 1992
OFFICE OF THE CLERK

(2)

No. 91-1610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM F. JENNINGS, *et al.*

Petitioners

vs.

JOSHUA INDEPENDENT SCHOOL DISTRICT, *et al.*

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE OF FRANCESCA RAINES AND ROYCE INGERSOLL D/B/A INSTITUTE OF CRIMINAL AND CIVIL INVESTIGATION TO PETITION FOR WRIT OF CERTIORARI OF JENNINGS

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and Civil Investigation

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No. 91-1610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM F. JENNINGS, *et al.*

Petitioners

VS.

JOSHUA INDEPENDENT SCHOOL DISTRICT, *et al.*

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH COURT

RESPONSE OF FRANCESCA RAINES AND ROYCE INGERSOLL D/B/A INSTITUTE OF CRIMINAL AND CIVIL INVESTIGATION TO PETITION FOR WRIT OF CERTIORARI OF JENNINGS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents, Francesca Raines and Royce Ingersoll d/b/a Institute of Criminal and Civil Investigations, two (2) of the Defendants in the District Court and two (2) of the Appellees in the United States Court of Appeals for the Fifth Circuit respectfully submit this their Response to Petitioner Jennings' Petition for Writ of Certiorari.

STATEMENT OF THE NATURE OF THE CASE

Respondents Ingersoll and Raines do not dispute the Statement of the Case contained within the Opinion of the Fifth Circuit set out in *Jennings, et al v. Joshua Independent School District, et al,* 869 F.2d 870, 871 (5th Cir. 1989) (Pet.App.27a-42a) and *Jennings, et al v. Joshua Independent School District, et al,* 948 F.2d 194, 196 (5th Cir. 1991) (Pet.App.1a-9a). Respondents would, however, emphasize the following:

1. Petitioner Jennings had voiced strong disapproval of the sniffer-dog program prior to the events which are at issue here.

2. On the day of the incident in question, Petitioner Jennings threatened to sue everyone on the premises, including Respondent Raines.

3. Petitioner Jennings sued Respondents Raines and Ingersoll in spite of the fact, as he testified at trial, that he did not think that his or his daugher's constitutional rights had been violated by any of the actions of Respondents Raines or Ingersoll.

4. Petitioner Jennings, with his attorney Petitioner Gladden, conducted no pre-complaint investigation at all to determine whether there was any basis for a theory of collusive conduct between the police and the other Defendants. There was no basis for Petitioners' suspicion that the school was in collusion with the police.

SUMMARY OF ARGUMENT

Petitioner Jennings has waived review of any issue regarding joint and several liability with Petitioner Gladden for sanctions imposed pursuant to Rule 11 violations.

In the alternative, the Court did not abuse its discretion in jointly and severally imposing sanctions against Petitioners Jennings and Gladden. There was sufficient evidence adduced by the trial court to show Petitioner Jennings' culpability; the violations were not wholly based on Petitioner Jennings' attorney's errors with regard to the law.

ARGUMENT AND AUTHORITY

WAIVER

Though the issue of propriety of imposition of Rule 11 sanctions has been an issue in this case since the filing of the first appeal, Petitioner Jennings did not raise the issue of the propriety of his joint and several liability for sanctions until this case had been briefed and argued in the Fifth Circuit for the second time. This issue was not raised in the initial Application for Petition for Writ of Certiorari filed during the October Term, 1989. Therefore, it is waived.

Generally, an appellate court will not address on appeal an argument or issue not raised in the trial court or in a brief as such issue has not been properly preserved for appeal. *Picco v. Global Marine Drilling Company,* 900 F.2d 846, 849 n.4 (5th Cir. 1990). See also *United Paperworkers International Union v. Champion International Corporation,* 908 F.2d 1252, 1255 (5th Cir. 1990) ("an appellant abandons all issues not raised in its *initial* brief", original emphasis). The basis for this premise is that allowing a party to first raise an issue on appeal results in unfair surprise, and tends to prolong litigation through remands for additional findings. There needs to be finality in litigation for the sake of judicial economy. *Hicks v. Gates Rubber Co.,* 928 F.2d 966, 970-971 (10th Cir. 1991).

Respondents do recognize that there are exceptions to this rule, though rare.

> Exceptions to this rule are rare and generally limited to cases where the jurisdiction of a court to hear a case is questioned, sovereign immunity is raised, or when the appellate court feels it must resolve a question of law to prevent miscarriage of justice . . . The failure to raise the issue with the trial court precludes review except for the most manifest error.

928 F.2d at 970. Review of such an issue is discretionary and will be addressed on a case by case basis. *Id.*

In *Taft Broadcasting Company v. United States*, 929 F.2d 240, 244 (6th Cir. 1991) the Sixth Circuit has included an interesting discussion of this issue. When an issue of fact is newly raised on appeal and would necessitate or require a determination of facts, that is "generally deemed good reason to refuse consideration of the issue for the first time" on appeal. If the issue addressed is a question of law, courts will on occasion consider such new issue. *Id.* Generally, "[a] federal appellate court can resolve an issue not passed on below 'where the proper resolution is beyond any doubt or where injustice . . . might otherwise result.' " *Id.*

Petitioner Jennings is not raising a newly presented issue of law, but rather a newly presented issue of fact. He is asking this Court to review the record to determine if there is sufficient evidence to hold him jointly and severally liable for sanctions. Though he couches his arguments in terms of new issues of law, this is misleading and readily apparent upon reviewing his argument. He states that "sanctions predicated on the improper purpose or intentionally wrongful conduct of Mr. Jennings personally are not at issue here," and "There is not a shred of evidence in the record of any ulterior motive that Mr. Jennings had against any of the defendants. . . ." (Petition for Writ of Certiorari, Jennings p.10, p.10n.1) Even a cursory review of the trial court's Order of January 5, 1988 (Pet.App. 10a-24a) and the Fifth Circuit's Opinion of April 12, 1989, (Pet.App. 27a-42a), show that there was

ample evidence upon which the trial court based its ruling regarding sanctions.

This is not a case where "proper resolution is beyond any doubt or where injustice might otherwise result". Thus, this Court need not address this newly raised issue.

Petitioner Jennings has cited several cases in support of his argument for review of this issue. Respondents are aware of the remand in *In Re Ruben v. Warren City Schools*, 825 F.2d 977 (6th Cir. 1987), but would argue that the facts are distinguishable. In *Ruben*, the majority of the sanction fell on Plaintiff Rathbun because she never had an adequate opportunity to be heard as she had been "abandoned" by her attorneys, and the district court's order did not clearly set forth the legal grounds for sanctioning Rathbun. In the case *sub judice*, the trial court imposed sanctions jointly and severally. Further, it clearly set forth the legal bases for sanctions, those being Rule 11 and 42 USC §1988.

In *Quiroga v. Hasbro, Inc.*, 934 F.2d 497 (3rd Cir. 1991), the case was remanded for consideration of whether sanctions should have also been levied against Plaintiff's attorney, or solely against Plaintiff Quiroga. Sanctions were initially imposed only against Plaintiff Quiroga though there appeared to be as much fault on the attorney's part as on the part of Plaintiff for filing a frivolous suit. In the case at hand, the trial court clearly delineated Petitioner Jennings' role in the frivolous suit, in conjunction with the conduct of Petitioner Gladden. Remand in this case would not net any new or surprising information and is unnecessary.

In *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, the Court addressed the conflict of interest which can arise when an attorney represents a party on appeal though Rule 11 sanctions have been imposed against both. The facts are quite different from those at hand as Plaintiff Calloway appeared *pro se* on appeal, which appeal was dismissed for failure to prosecute; and he appeared to have serious mental

problems. The Court did acknowledge that "when the party does know that the filing and signing is wrongful and the attorney reasonably should know, then sanctions against both are appropriate". *Id.* at 1475.

The case was remanded for a determination of Plaintiff's responsibility for violative conduct. In the case at hand, Petitioner Jennings' conduct was clearly set forth by the trial court and considered in its ruling. There can be no doubt as to Jennings' culpability based on the evidence.

In *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989), the issue is whether a law firm rather than an individual attorney should be liable for sanctions. Sanctions against a Plaintiff are nowhere addressed in the opinion.

Finally, in *White v. General Motors Corporation, Inc.*, 908 F.2d 675 (10th Cir. 1990), the Court was found to have assessed joint and several liability without considering the relative fault of the Plaintiffs and their attorney. The cause was remanded for more specific findings.

ARGUMENT AND AUTHORITY

JOINT AND SEVERAL IMPOSITION OF SANCTIONS

If this Court chooses to address the merits of Petitioner Jennings' newly raised issue, Respondents would argue that the trial court did not err in imposing sanctions against Petitioner Jennings and Petitioner Gladden, jointly and severally.

It has long been established that Rule 11 does not solely apply to attorneys. Further, for sanctions to be imposed against a party, he need not have actually signed a pleading. Sanctions are appropriate against a party if they have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons". *Chambers v. NASCO*, ___ U.S. ___, 111 S.Ct. 2123, 2133 (1991), citing *Alyeska Pipeline Service Co. v. Wilderness*

Society, 421 U.S. 240 (1975). If a Plaintiff's claim is found to have been frivolous, unreasonable, or groundless and this was apparent to the Plaintiff, then sanctions against a party would be appropriate. *Eastway Construction Corporation v. City of New York*, 762 F.2d 243,252 (2nd Cir. 1985).

In his Brief, Petitioner Jennings asserts that any sanctionable conduct was perpetrated by his attorney, Petitioner Gladden herein. He claims that he is being held responsible for Petitioner Gladden's failure to adequately inquire into the law. That is not the case as is so clearly set forth by the trial court in its January 5, 1988 Order and the Fifth Circuit's 1989 Opinion. (Pet.App. 10a-24a, 27a-42a).

Petitioner Jennings is not an innocent neophyte. At the time of this incident, he was in his own words, "a Federal law enforcement officer." As a law enforcement officer, one would assume Petitioner's familiarity, however cursory, with search and seizure law.

In his Brief, Petitioner Jennings asserts that there was no evidence that he personally engaged in intentionally wrongful conduct. He also asserts that the Court of Appeals based the Rule 11 sanctions "solely" on the failure of Petitioner's attorney. Petitioner has only referred this Court to the Fifth Circuit's December 10, 1991 Opinion. He has chosen to ignore the Fifth Circuit's earlier Opinion which quite specifically details Petitioner Jennings' culpable conduct in this tiresome litigation.

This is not a case of a nonsigning party being held responsible for his attorney's misconduct. It is a case where Petitioner Jennings actively participated in pressing a frivolous suit with full knowledge of its baselessness. There is no confusion in the case law on this issue. Many of the cases cited by Petitioner go to this very issue and affirmed sanctions against Plaintiffs and their attorneys.

In *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir. 1985), the Court found that sanctions against the

Plaintiff were proper as she was the "catalyst behind this frivolous motion". In *Chevron*, the Plaintiff did not sign the Motion which resulted in sanctions.

In *Southern Leasing Partners, Ltd. v. McMullan,* 801 F.2d 783 (5th Cir. 1986), sanctions were imposed against Plaintiff and its attorneys, though Plaintiff did not sign any pleadings. The Court found that the legal arguments put forth on Southern Leasing's behalf were without merit. The fact that these arguments were almost mirror images of an earlier suit filed by Southern Leasing contributed to the Court's decision to hold Southern Leasing liable for sanctions.

The Court was found to have acted within its discretion in sanctioning both Plaintiffs and their attorney in *Robinson v. National Cash Register Company,* 808 F.2d 1119 (5th Cir. 1987). Once again, the Plaintiffs did not sign any pleadings, yet were still sanctioned. The sanctions were based on the fact that both Plaintiffs and their attorney continued to press a suit not well grounded in fact or law, and which was clearly precluded by *res judicata.*

In *Bastien v. Rowland,* 116 F.R.D. 619 (E.D. Mo. 1987), the Court upheld an award of sanctions against Plaintiffs and their counsel. It appears that the reasons for sanctions were both a lack of proof of Plaintiffs' claims and counsel's conduct of the litigation.

> The Court does not hold plaintiffs blameless. This was their litigation, and their counsel must be deemed to have acted at their direction.

Id. at 621.

A frivolous dismissal motion resulted in sanctions against Defendants and their attorneys, jointly and severally, in *Ortho Pharmaceutical Corporation v. Sona Distributors,* 847 F.2d 1512 (11th Cir. 1988). The Court found that counsel's prefiling inquiry regarding a defense of lack of personal jurisdiction over Defendants was unreasonable, yet sanctions were imposed against both.

In *Painewebber, Inc. v. Can Am Financial Group, Ltd.*, 121 F.R.D. 324, 330 (N.D. Ill. 1988), the Court noted that, "Rule 11 applies to every statement and claim in a paper." The Court found that Defendants' attorney did not conduct a reasonable investigation into the facts of a Motion to Vacate, and that Defendant George lied to his attorney regarding certain facts.

More recently, in *Romala Corporation v. United States*, 927 F.2d 1219 (Fed.Cir. 1991), sanctions were upheld against Plaintiff and its attorney for a frivolous appeal. Part of the sanctions were to be born solely by counsel for frivolity in the types of arguments employed. The remaining sanctions were imposed jointly for filing a frivolous appeal.

Because Plaintiffs' complaint had no reasonable factual basis when filed and Plaintiffs were aware of this, the Court in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), imposed sanctions against Plaintiffs for their bad faith conduct.

In *Peregoy v. Amoco Production Company*, 133 F.R.D. 113 (E.D. Tex. 1990), sanctions were jointly imposed against Plaintiffs and counsel even though the Court held that the violative conduct resulted from Plaintiffs' counsel's failure to make a reasonable inquiry into the facts or the law before filing suit.

Though many more cases on this issue are available for perusal, they are not at odds with the cases cited above.

CONCLUSION

The trial court did not err in imposing sanctions against Petitioners Gladden and Jennings jointly and severally. Petitioner Jennings waived review of this issue on appeal by not presenting it in the initial appeal of this matter.

PRAYER

Based on the foregoing arguments, applicable case law, and the evidence presented, Petitioner Jennings' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/ HOLLYE C. FISK

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PROOF OF SERVICE

I, Hollye C. Fisk, Counsel for Respondents Raines and Ingersoll, depose and state that on the ___ day of May, 1992, I served three (3) copies of this Response of Raines and Ingersoll to Petition for Writ of Certiorari of Jennings on Counsel of Record Laurance L. Priddy, Attorney at Law, 301 Commerce Street, Suite 1210, Fort Worth, Texas 76102; Alan B. Morrison, Public Citizen Litigation Group, 2000 P Street, N.W., Suite 700, Washington, D.C., 20036; as well as Counsel of Record for other Respondents, David B. Owen, Quillin, Owen & Thompson, 550 Bailey, Suite 601, Ft. Worth, Texas 76107; and Mark M. Donheiser, Strasburger & Price, 901 Main Street, Suite 4300, LB 175, P.O. Box 50100, Dallas, Texas 75250.

/s/ HOLLYE C. FISK

Hollye C. Fisk
Affiant

SWORN TO AND SUBSCRIBED before me on this the ___ day of May, 1992.

Notary Public, in and for
State of Texas

Printed Name of Notary Public

My commission expires:

Supreme Court, U.S.
FILED
MAY 6 1992
OFFICE OF THE CLERK

(3)

No. 91-1610

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WILLIAM JENNINGS, *et al.*,

Petitioners

v.

JOSHUA INDEPENDENT SCHOOL DISTRICT, *et al.*,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief in Opposition to Petition for Certiorari

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No. 91-1610

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WILLIAM JENNINGS, *et al.*,

Petitioners

v.

JOSHUA INDEPENDENT SCHOOL DISTRICT, *et al.*,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief in Opposition to Petition for Certiorari

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents Joshua Independent School District (hereafter "JISD"), superintendent Charles Greenawalt, and assistant principal Larry Loftin (collectively referred to as "School Defendants"), hereby respectfully submit their Brief in Opposition to Certiorari.

STATEMENT OF THE CASE

Petitioners ask this Court to review Rule 11 sanctions imposed jointly and severally against plaintiff Jennings and his attorney for filing and persisting in a groundless lawsuit.

On the original appeal[1] the Court of Appeals quoted with approval the trial court's finding that:

> Plaintiffs, counseled by their attorney, sued Defendants knowing at the outset what the evidence, for the most part, would show. . . . Surely, the outcome was foreseeable to Plaintiff's attorney, if not entirely plain to Plaintiff William Jennings himself. It is apparent from Plaintiff William Jennings' testimony that his only purpose in bringing suit was to harass all the defendants. Plaintiff's attorney cooperated fully in this endeavor. Certainly, it is this type of practice by parties and their attorneys that Rule 11 was meant to eliminate.
>
> Appendix at 39a.

The Court of Appeals further held:

> Because it should have been clear at the outset to Jennings and his attorney that even if the county judge had issued the warrant on insufficient probable cause, the facts could not have supported claims against any of the named defendants except Officer Stevens, the district court did not abuse its discretion in imposing Rule 11 sanctions jointly and severally upon Jennings and his attorney, Don Gladden, for their claims against the school defendants, dog handlers and dog owners. [citations omitted]
>
> Appendix at 41a.

The Court of Appeals affirmed the district court's judgment on the merits, and findings that attorney fees should be awarded both under 42 U.S.C. § 1988 and Rule 11. Appendix 37a. The Fifth Circuit's en banc decision in *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) (en banc) was rendered after the district court's initial decision in this case.

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[1] *Jennings v. Josuha ISD*, 877 F.2d 313 (5th Cir. 1989) (on rehearing), *cert. denied* 110 L.Ed.2d 668 (1990); Appendix at 39a.

The Court of Appeals (on rehearing) adhered to their affirmance on the merits and as to the Petitioners' joint and several liability for Rule 11 sanctions, but remanded to the district court:

> . . . to address Thomas's mitigation and notice requirements, as well as Thomas's command that the sanctions be the least severe sanctions adequate under the circumstances to promote Rule 11's purposes of education, compensation and deterrence.
>
> 877 F.2d at 321-22; Appendix at 44a.

Jennings and his attorney then filed petitions for certiorari, which this Court denied at 110 L.Ed.2d 668 (1990).

On remand, the district court – without a hearing or inviting briefs from the parties – found that Respondents discharged their duty to mitigate, but did not give adequate notice to Petitioners that their case was groundless and potentially subjected them to sanctions. The Court of Appeals found this to be clearly erroneous. Appendix at 6a. Defendant's original answer pleaded:

> Your Defendants would show that Plaintiff's suit is without substantial merit and is filed in bad faith for purposes of vexation, abuse, or in an attempt to harass or embarrass Defendants. Accordingly, Defendants are entitled to an award of reasonable attorney's fees for their defense herein.
>
> Appendix, 7a.

The district court further found that a reduction of the fee award by one-half was the least severe sanction adequate to accomplish Rule 11 purposes.

Petitioners appealed. Chief Judge Clark, writing for a unanimous panel, said:

> The legal basis for such joint liability was made clear. Both Gladden and Jennings failed to conduct a reasonable inquiry into the facts or law before filing the lawsuit. Gladden filed the pleadings and Jennings signed a sworn affidavit to oppose the defendants' motion for summary judgment. Jennings' only purpose in bringing this action was to harass the defendants. *Jennings*, 877 F.2d at 320.

Jennings II, 948 F.2d 194 (5th Cir. 1991); Appendix at 4a.

On the issue, however, of the appropriateness of the sanction, the Court of Appeals found that merely halving the award of attorney fees did not indicate an exercise of discretion to find the point of least severe sanctions. Appendix at 8a, citing *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. at 2461. The Court went on to find that the fees attributable to plaintiff ended with the district court's denial of defendants' motion for summary judgment. (Stating, however, that ". . . it is difficult to understand how this wholly frivolous action could have survived any motion for summary judgment." Appendix at 8a.) Since detailed time records were a part of the record on appeal, the Court fixed the amount of such fees and entered judgment accordingly, expressing in so doing the intent of the Court "to bring these proceedings to a close." Appendix at 9a.

The facts of this nearly seven-year old litigation are set forth in *Jennings v. Joshua Independent School District*, 877 F.2d 313 (5th Cir. 1989) (on rehearing), *cert. denied* 110 L.Ed.2d 668 (1990) (Jennings I),[2] and *Jennings v. Joshua Independent School District*, 948 F.2d 194 (5th Cir. 1991) (Jennings II).[3] We respectfully invite the Court's attention to the fact findings in those decisions.

---

[2]Appendix 28a-42a (869 F.2d 870), in conjunction with 43a-45a (877 F.2d 313), which is abbreviated in the Appendix to show only the substitution on rehearing for the last three full paragraphs of section IV and section V of the prior opinion.

[3]Appendix 1a-9a.

This was a civil rights action brought under 42 U.S.C. § 1983 against school officials, a policeman, sniffer-dog handlers and other defendants, as a result of a school program intended to educate students as to the dangers of drugs, alcohol and weapons, and to deter them from bringing any of those items to school.

Periodically, as a deterrent, trained dogs sniffed unattended student cars in the high school parking lot. In the event of an alert, the student would be told what the dog was trained to do, asked if there was an explanation, and requested to permit a search of the car. If consent was denied, as it was in this case, the school backed off, withdrew from further participation, and turned the matter entirely over to law enforcement authorities.

Pursuant to Rule 15, we respectfully challenge the assertions in the Gladden petition on pp. 8 and 9 that: (1) ". . . the School Board reached the conclusion that 'alerts' by these dogs were, in and of themselves, sufficient to warrant police involvement, and that '[t]he canines [would] be used to establish probable cause for a search warrant and subsequent forcible entry' into the vehicles of non-consenting students; (2) that school officials called the police "to assist in gaining entry into the automobile of . . . Jennings . . .;" and (3) that the search warrant was obtained and the search made "at the behest of the school officials."

The record and the findings of the Courts below will not support such assertions. To the contrary, the record is undisputed that Superintendent Greenawalt told Jennings and Officer Stevens, when consent to search was not forthcoming, that it would no longer be a school matter, but a police matter (R.10, 299), and requested only that the officer "consider" doing whatever was "legally possible." (R.10, 300) This record, and the fact findings of the Courts below, will not support assertions of school and police entanglement or joint action, or

that the police officer merely did the bidding of the school officials. The record is clear that the police officer acted with total independence in seeking a search warrant, and that the school officials stayed entirely out of it.

Further, under Rule 15, Petitioner Jennings omits the findings of the lower courts, supported by the record, that Jennings was himself a law enforcement officer, had participated in dog searches, and was, prior to filing suit, thoroughly conversant with the Fifth Circuit's decision in *Horton v. Goose Creek ISD*, 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 464 U.S. 1207 (1983).

He testified at trial that he did not think dogs had any place in an educational setting; that by his suit he sought a determination that there should be no sniffing dogs allowed under the Constitution. (R.9, 207) Three months before the alert on his daughter's car, Jennings instructed her that she was not to consent to any search. (R.9, 159-160)

This record will not support the contention that Jennings merely followed his lawyer's advice. The Court of Appeals found that, "It is apparent from Plaintiff William Jennings' testimony that his only purpose in bringing suit was to harass all the defendants." Appendix at 39a.

SUMMARY OF THE ARGUMENT

The decisions of the district court on Rule 11 sanctions, as modified by the Court of Appeals, do not constitute an abuse of discretion, which is the standard of review as held by this Court in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ____, 110 S.Ct. 2447, 110 L.Ed.2d 359, 381-82 (1990), and the Fifth Circuit in *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866, 872 (5th Cir. 1988) (en banc).

The groundless nature of this lawsuit, as the basis for a fee award under § 1988 or Rule 11, was clearly established by the

findings of the courts below, and supported by the record. There can be no liability under § 1983 just because someone calls the cops and then leaves subsequent decisions and actions entirely within their hands. All these matters were determined adversely to the claims of Petitioners on the first appeal of this case, and certiorari was denied by this Court.

Petitioner Gladden's assertion that the Fifth Circuit is somehow adhering to a "break in causation" theory contrary to this Court's holding in *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) is: first, clearly not the basis of the Circuit Court's decision (see Appendix 32a-35a, as to officer Stevens, and 35a-37a, as to the other defendants); second, no different from Petitioner's contentions on the prior appeal as to which certiorari was denied; and, third, wholly inapplicable to the facts of this case as to all parties other than the police officer.

Petitioner Jennings' assertions that he ought not to be sanctioned for following his lawyer's advice are untenable in this record because: first, Jennings knew all of the facts at the outset and was himself versed in the law to the extent that he was a law enforcement officer with experience in dog cases and was thoroughly conversant with *Horton*; second, because Jennings' misconduct, independent of his lawyer's, makes him liable for attorney fees because he filed this suit maliciously and in bad faith for the purpose of harassing the defendants, and because he is liable under § 1988; and, third, because, "Any review of Jennings' joint and several liability is foreclosed by [the Court of Appeal's] partial affirmance in [their] prior opinion. *Jennings*, 877 F.2d at 320." See Appendix at 4a.

If there was any conflict in interest between Mr. Jennings and his attorney, it should not affect the rights of these Respondents who had to defend against the aggressive and able advocacy of Mr. Gladden, and now his successors. Those issues, if such there be, are properly between Jennings and

Gladden in another court, in another case, on issues that have nothing to do with the rights of Respondents in this case.

ARGUMENT – REASONS TO DENY THE WRIT

I.

Rule 11, Generally

The Rule 11 standard of review is abuse of discretion. *Cooter & Gell v. Hartmarx Corp., supra; Thomas v. Capital Sec. Services, Inc., supra.* There is no abuse of discretion under this record, no conflict of legal principles between the Fifth and other Circuits, and nothing unique or of overweening importance to merit the attention of this Court.

The findings of the district court in its January 5, 1988, Order fully justified an award of attorney fees under § 1988 and the imposition of sanctions under Rule 11, were supported by the record, and were affirmed by the Court of Appeals in Jennings I. Appendix 27a-42a, as modified on rehearing by Appendix 43a-45a. As stated above, this Court denied certiorari to review those decisions.

Once it is determined that a violation of Rule 11 has occurred, the imposition of an appropriate sanction is mandatory. *Thomas, supra; Jennings II*, Appendix at 5a. The determination that a violation of Rule 11 had occurred was made, affirmed by the Court of Appeals, and certiorari denied by this Court prior to the limited remand.

Accordingly, Petitioners' assertions, which argue that they did not violate Rule 11, have long since been foreclosed. They have had considerably more than their day in court on that issue, and they are appealing here from a judgment reviewing and modifying the appropriateness of the sanctions, and, as to that issue, Petitioners have said nothing at all.

II.

Response to Petitioner Gladden

Petitioner Gladden's position is essentially no different from what it was on the prior appeal.[4] With remarkable stubbornness and persistence, he continues to argue that somehow the Fifth Circuit has placed itself in conflict with this Court's opinion in *Malley v. Briggs*, 475 U.S. 335 (1986). The Court below did not hold that there was a break in causation or an insulation between the actions of the school defendants and the search of the Jennings' car by the policeman. It was not a question of qualified immunity, such as *Malley* was.

Merely calling the police does not subject the caller to liability under § 1983. *Arnold v. International Business Machines Corp.*, 637 F.2d 1350 (9th Cir. 1981); *Williams v. Adams*, 836 F.2d 958 (5th Cir. 1988); *Hernandez v. Schwegmann Bros. Giant Supermarkets, Inc.*, 673 F.2d 771 (5th Cir. 1982); *White v. Scrivner Corp.*, 594 F.2d 140 (5th Cir. 1979); *Benavidez v. Gunnell*, 722 F.2d 615 (10th Cir. 1983); *Butler v. Goldblatt Bros., Inc.*, 589 F.2d 323 (7th Cir. 1978); *Love v. King*, 784 F.2d 708 (5th Cir. 1986); *Triplett v. Azordegan*, 570 F.2d 819 (8th Cir. 1978).

To be liable under § 1983, a defendant must have been personally involved in a wilful act causing the deprivation of a constitutional right, or must have been chargeable with knowledge that subordinates were causing such a deprivation. *Love, supra*, 784 F.2d at 711. Liability exists only if a person subjects another to a deprivation of a constitutional right by an affirmative action, participation in another's affirmation action, or if he omits to perform an act which he is legally required to do, causing such deprivation. *Arnold, supra*. Additionally, under § 1983, state action is required pursuant to some policy, custom or usage. *Monell v. Department of*

[4]No. 89-469 in the Supreme Court of the United States.

Social Services of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

None of that is even remotely involved in this case. Given the undisputed facts, known by Petitioners from the beginning, that the school authorities did nothing beyond using a trained dog to check out unattended cars in the high school parking lot – not even a search within the meaning of the Fourth Amendment, as held by *Horton*, *supra*–; and called a law enforcement officer when consent was refused but did not participate, control or direct the wholly independent actions of the police officer, or even request that the policeman do anything except to "consider" what was "legally possible," we submit that *Malley* is wholly inapplicable, and Petitioner Gladden raises nothing substantially different from his already rejected 1989 petition, and that he presents no viable argument now for the granting of certiorari.

III.

Response to Petitioner Jennings

Petitioner Jennings urges two theories: first, that he is not subject to Rule 11 sanctions because his lawyer signed the groundless pleadings, and he didn't; and, second, because any error of law was the responsibility of his attorney for which he is not responsible. Almost incidentally, the petition complains that Jennings was not separately represented in the first appeal.

We submit, first, that if signing something is the *sine qua non* of Rule 11 (which Jennings admits is not the law), he did sign a sworn affidavit in opposition to Respondents' motion for summary judgment. Appendix 4a.

As to Jennings' lack of separate representation on the first appeal, we have some difficulty knowing what Respondents were supposed to do about that, if, in fact, there was a conflict

of interest between parties over whom Respondents had no control. Conflicts of interest, if such there were, should have their consequences visited on the parties in conflict, not on innocent victims.

Without question the Court of Appeals in Jennings I held that the legal basis for joint liability was clear:

> Both Gladden and Jennings failed to conduct a reasonable inquiry into the facts or law before filing the lawsuit. Gladden filed the pleadings and Jennings signed a sworn affidavit to oppose the defendants' motion for summary judgment. Jennings' only purpose in bringing this action was to harass the defendants. *Jennings*, 877 F.2d at 320.
>
> Appendix at 4a.

The Court further held:

> Any review of Jennings' joint and several liability is foreclosed by this Court's partial affirmance in our prior opinion. *Jennings*, 877 F.2d at 321.
>
> Appendix at 4a.

We submit, further, that Petitioner's poor-me characterization of his role in this litigation bears little resemblance to the record. As shown above, Jennings was himself a law enforcement officer who had participated in dog searches and was well read in the law.

Jennings cites *Business Guides, Inc. v. Chromatic Committee Enterprise, Inc.*, 498 U.S. ____, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991). On the facts, it is hard to see any relevance to the case at bar, and, on the law, that case is by no means in conflict with any holding of the Court of Appeals in the case at bar. At most, it says that the Supreme Court has not yet defined the parameters of liability under Rule 11 for a nonsigning party. 112 L.Ed.2d at 1161. But, as we have

already shown, Jennings can't qualify as a nonsigner. Even if that were not so, common sense dictates that the presence or absence of an autograph is no window to the soul. It is, as well, no universal yardstick for determining who is, or is not, in violation of Rule 11.

The purpose of Rule 11 is to deter the filing of groundless lawsuits. This lawsuit was groundless. Jennings was in the thick of it, as the record demonstrates, and should not now be allowed to hide behind his lawyer's skirts, for, if it had not been for Jennings, none of this would have happened.

Jennings signed the affidavit in opposition to summary judgment. His motives and his conduct, quite apart from his lawyer's actions, are exactly those which ought to be deterred.

IV.

Summing Up

Rule 11 is intended to serve purposes of education, compensation and deterrence. *Jennings I*, 877 F.2d at 321-22.

Respondents were subjected to a groundless lawsuit brought for purposes of harassment. On every occasion, from original answer to trial, Respondents pleaded that under the undisputed facts the school defendants could not be liable for the search of plaintiff's car, even if unconstitutional (there has been no determination of that issue; the jury exonerated the police officer),[5] because the school officials did not have anything to do with the search. They merely called the police and turned the matter entirely over to them – a police matter, not a school matter – as Superintendent Greenawalt said to Plain-

[5]There is an irony in this case that the police officer who got the search warrant and made the search is no longer an interested party, and his employer, the City of Joshua, was dismissed prior to trial.

tiff Jennings on the parking lot when the matter could not be worked out by consent.

Respondents' motion for summary judgment was overruled.[6] When plaintiff rested after five days of trial before a jury, Respondents moved for a directed verdict, and the district court granted the motions of all defendants except the police officer, whose case went to the jury and resulted in a verdict in his favor.

On the first appeal the Court of Appeals had little difficulty affirming the directed verdict and the correctness of the trial court's imposition of sanctions. The remand was limited to the question of what kind of sanctions were appropriate – not whether, but what kind, of sanction should be applied. This Court denied certiorari. Petitioners then filed in the Court of Appeals what we submit was an unprecedented and frivolous motion to recall the mandate, and on its denial a motion for rehearing and rehearing en banc. The Court of Appeals denied those motions.

On remand, the district court cut the fee award in half without affording Respondents the opportunity for a hearing or to file briefs. On the second appeal, the Court of Appeals further reduced Respondents' fee award on the rationale that Petitioners could not be held responsible for Respondents' costs incurred after the date of the district court's unfortunate failure to grant summary judgment. Perhaps it is not surprising that Petitioners say nothing as to the appropriateness of the award, but rather attempt to reopen and relitigate questions long since decided on the first appeal.

The Court of Appeals also declined to make any further fee award for Respondents' appellate burdens under Rule 38,

[6] Chief Judge Clark noted in the opinion below that ". . . it is difficult to understand how this wholly frivolous action could have survived any motion for summary judgment." Appendix at 8a.

Federal Rules of Appellate Procedure. This Court prophetically recognized that "disallowing an award of appellate attorney's fees under Rule 11 would [possibly] discourage litigants from defending the award on appeal when appellate expenses are likely to exceed the amount of the sanctions." *Cooter & Gell v. Hartmarx Corp.*, 110 L.Ed.2d at 383. Respondents had to defend the first appeal which, as to the merits, was groundless, then a petition for certiorari, and a motion to recall mandate after denial of certiorari and a motion for rehearing en banc on that issue. The bottom line is that Respondents are worse off than they would have been if they had never asked for a fee award.[7]

Now, after nearly seven years of defending against a groundless cause of action that went up and down the appellate ladder, and now comes up again, Respondents must once again defend against the Petitioner's efforts to reopen and relitigate what should have been laid to rest long ago. If the purposes of Rule 11 are education, compensation and deterrence, the results of this case teach that wronged Respondents have little hope of compensation; the lesson is not to ask for sanctions; and the deterrence is on the victim, not the perpetrators.

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[7]Respondents' motion was based on 42 U.S.C. § 1988, and, in the alternative, under Rule 11. The district court found that we were entitled to a § 1988 award, but that sanctions should be imposed against Jennings and his attorney under Rule 11.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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